IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1170

COLONEL GERALD V. KEHRLI,
United States Air Force (Ret.),

Petitioner,

—v.—

COLONEL HOMER R. SPRINKLE, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
(212) 725-1222
Attorneys for Petitioner

TABLE OF CONTENTS

APPENDIX

Table of Authorities

Constitutional Provisions

Statutory and Regulatory Provisions

Other Authorities

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered October 20, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 524 F.2d 328, and is set out in the Appendix, infra, at pp. 1a-14a. The opinion of the United States District Court for the District of Kansas on remand from the Court of Appeals is unreported and is set forth in the Appendix, infra, at pp. 15a-25a. The per curiam order of the Court of Appeals, reversing and remanding the case to the District Court, is unreported and is set forth in the Appendix, infra, at pp. 28a-30a. The initial opinion of the United States District Court is unreported and is set forth in the Appendix, infra, at pp. 31a-46a.

The order of the United States Court of Military Appeals, denying a petition for review, is reported at 44 CMR 940 and is set forth in the Appendix, infra, at pp. 47a-48a. The opinion of the United States Air Force Court of Military Review is reported at 44 CMR 582, and is set forth in the Appendix, infra, at pp. 49a-58a. Relevant portions of the Staff Judge Advocate's Review are set out in the Appendix, infra, at pp. 59a-81a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 20, 1975.

By order dated January 6, 1976, Mr. Justice White extended the time for filing this petition to and including February 18, 1976. The jurisdiction of this court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the courts below, presented on habeas corpus with claims that the petitioner's court-martial conviction was obtained in violation of the Fourth Amendment and the requirements of due process of law, properly refused to adjudicate such claims on the ground that they received full and fair consideration in the military proceedings?

2. Whether claimed irregularities in the procedures whereby the general court-martial was convened - utilization of improper Article 32 preliminary investigation procedures, bypassing the immediate commanding officer in the prefering of charges, improper influence of command policy by command officials - combined to deprive the petitioner of due process of law?

3. Whether the basis for and the communication of an undercover agent's signal provided probable cause for the petitioner's arrest and consequent search by military police?

4. Whether Article 134 of the Uniform Code of Military Justice is unconstitutionally

vague as applied to the offenses of possession, use and transfer of marihuana?

5. Whether the petitioner's court-martial conviction, four-year sentence and $15,000 fine, all imposed for off-duty possession and use of marihuana violated the requirements of equal protection, the right of privacy and the prohibition of cruel and unusual punishment, and could properly be imposed absent a specific factual showing that such conduct was directly and palpably prejudicial to good order and discipline?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First, Fourth, Fifth and Eighth Amendments to the Constitution, as well as Article One, Section Eight, which provides:

> The Congress shall have power... To Make Rules for the Government and Regulation of the Land and Naval forces;"

and Article One, Section Nine, which provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This case also involves the following Articles of the Uniform Code of Military Justice:

> Article 1. Definitions....
>
> (9) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused. 10 U.S.C. Section 801.
>
> Article 22. Who may convene general courts-martial....
>
> (b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him. 10 U.S.C. Section 822.
>
> Article 32. Investigation.
>
> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made.... 10 U.S.C. Section 832.

Article 134. General article.

Thogh not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. 10 U.S.C. Section 934.

Finally, this case involves paragraph 213b of the Manual for Courts-Martial, which provides, inter alia, as follows:

> It is a violation of this Article wrongfully to possess or use marihuana or a habit forming narcotic drug.

STATEMENT OF THE CASE

The petitioner, Colonel Gerald V. Kehrli, is a retired United States Air Force officer, with almost thirty years experience, who in February 1971 was convicted by a general court-martial in Vietnam of three specifications of use of marihuana, two specifications of transfer of marihuana, and one specification of possession of marihuana. All of the charges were brought under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. Section 934. Pursuant to that conviction, he was sentenced to confinement at hard labor for three to four years, and payment of a $15,000 fine in lieu of the fourth year of confinement (App. infra, p. 2a). In January 1972, petitioner commenced service of this sentence at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. In June 1972, while so confined, he filed this habeas corpus proceeding.1/

1/ In May 1973, following 16 months of confinement, the petitioner was released on parole and remained in that status until January 1975. Petitioner has recently completed payment of the $15,000 fine adjudged as part of the sentence. Of course, the termination of petitioner's confinement and parole status does not render the case moot. Carafas v. LaVallee, 391 U.S. 234, 238-40 (1968); Gosa v. Madden, 413 U.S. 665, 670, n. 3 (1973).

The facts surrounding petitioner's arrest and conviction are as follows.

Petitioner was arrested on the evening of November 20, 1970, in his car outside the Vietnam Officers' Club at Tan Son Nhut Air Base, where he headed the 616th Military Airlift Support Squadron. The arresting officer, Captain William F. Daddio of the Base Security Police, himself never saw the petitioner violate the law, nor did he have independent knowledge that petitioner had done so. He relied, instead, on information given him by a team of Office of Special Inyestigations (OSI) officers. They told Captain Daddio that the petitioner would be in the company of one Lt. Jackson, with whom the petitioner had become friendly, who was acting as an informer. Jackson had been instructed by the OSI agents to give a signal if he "felt" that the petitioner was in possession of marihuana. As petitioner was leaving the Club, OSI Agent Cain told Captain Daddio that the signal had been given. Agent Cain himself also had not seen the signal, but had been informed by another OSI Agent that it had been given. Lt. Jackson had based his "feeling" on certain ambiguous remarks that petitioner had made during the course of the evening, but Jackson never saw anything which resembled marihuana. Although he did see petitioner holding a crumpled cigarette package, Jackson did not see its contents, and the petitioner did not refer to the contents as marihuana by name (Record of Trial, p. 143). (App., infra, pp. 68a-80a.)[2/]

In short, Captain Daddio, the arresting officer, was acting on the basis of an undercover agent he had never met, information which he himself did not have, and a signal which he himself did not see. During the petitioner's arrest, a cigarette package, found on the car door ledge, was seized. It contained four marihuana cigarettes (2.85 grams).

On November 29, 1970 charges of possession, use and transfer of marihuana were preferred against the petitioner by Brigadier General Charles J. Bennett, Jr., Chief of Staff of the Seventh Air Force at Tan Son Nhut Air Base, Vietnam. In the preliminary processing of these charges, the officer exercising summary and special court-martial jurisdiction over the petitioner (the Commander of the 377th Combat Support Group) was completely by-passed, and the charges

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2/ These facts are essentially undisputed and are summarized in the Staff Judge Advocate's Review, relevant portions of which are set forth in the Appendix, infra at pp. 68a-80a. The complete Staff Judge Advocate's Review is contained in the record filed with the Court of Appeals at pp. 18-44. (References to that record will be made as "R. ____.") The Record of Trial is contained in the record at R. 109-594.

were processed at the Seventh Air Force headquarters level only, a procedure which even the Staff Judge Advocate characterized as "extraordinary in some respects...." (App., infra, p. 65a.) The commander of the Seventh Air Force, General Lucius D. Clay, Jr. (the convening authority in this case) had a publicly-declared policy of leniently treating marihuana offenses by enlisted personnel, while invoking general court-martial jurisdiction against officers charged with the same offense. Indeed, when General Clay learned of this case he directed that general court-martial charges be preferred against the petitioner and instructed his staff judge advocate, Major Henson, to do whatever was necessary to accomplish this. Major Henson briefed General Bennett who formally preferred the charges. (App., infra, pp. 63a-68a.)3/

At trial, the prosecution case was based primarily on the testimony of certain enlisted

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3/ Although General Bennett's stipulated testimony indicated that he was not aware whether General Clay knew about or consented to the preferring of the charges, the petitioner testified that when General Bennett presented the charges to him, he was very apologetic and indicated that his office was merely a "go-between." (App. infra, pp. 67a-68a.)

men, who, under grants of immunity, testified that they had smoked marihuana with the petitioner at his quarters on base on certain occasions, that the marihuana was sometimes provided by the petitioner, and that on two occasions the petitioner smoked marihuana in cars with other enlisted men present. (App., infra, p. 35a.) These various incidents occurred during off-duty hours.

Lt. Jackson also testified and described a conversation with the petitioner one evening in early October 1970. They discussed the marihuana problem, and the petitioner had stated that on occasion he had used marihuana himself, that there was heavy usage in his organization by officers and enlisted men but that it wasn't a problem, that men who used marihuana always made it to work the next day, while those who used alcohol might not, and that the petitioner had converted a Captain in his unit to marihuana and smoked with him on one occasion. The petitioner also stated that he thought marihuana was a good thing because it had given him a better opportunity to eliminate a generation gap and better understand his men. Jackson also testified that petitioner smoked two cigarettes that night which Jackson was positive were marihuana. Finally, Jackson described the events of November 20 which caused him to feel the petitioner was in possession of marihuana and described the arrangements for signalling the OSI agents. (App., infra, pp. 36a-37a.)

At the conclusion of the trial, the petitioner was convicted of three instances of use of marihuana, two instances of transfer contemporaneous with such use (passing a marihuana cigarette to another person), one instance of possession of a small quantity of marihuana (the evidence seized during the arrest) and one instance of soliciting someone else to purchase marihuana (a charge later disapproved).

Following the conviction and sentence, the case was reviewed for the convening authority by the Staff Judge Advocate of the 22nd Air Force. The petitioner alleged that his military counsel did not have an opportunity to file an assignment of errors in connection with that review. (R.11). The Staff Judge Advocate's Review was dated May 11, 1971, as was the approving action of the convening authority. (App., infra, p. 42a.)

Thereafter, in August 1971, the Air Force Court of Military Review entered its decision approving the findings and sentence. (App., infra, pp. 49a-58a.) That opinion discussed only a few of the issues tendered by the petitioner. Instead, the Court deferred to the Staff Judge Advocate's Review on the majority of issues, including the alleged irregularities in the convening procedures and the illegal search and seizure

claim.[4]

By order dated January 19, 1972, the United States Court of Military Appeals denied the petition for review, without opinion. (App., infra, pp. 47a-48a.) Two weeks later the petitioner was ordered incarcerated at Leavenworth.

Having exhausted his military remedies, the petitioner filed this habeas corpus proceeding in the United States District Court for the District of Kansas. The District Court rendered its decision without a hearing, on the basis of the petition, brief and Record of Trial. First, that Court refused to consider the claimed irregularities in the procedures by which the court-martial had been convened and the illegal search and seizure issue, holding these questions beyond the scope of review on the ground that they had received the requisite "full and fair consideration" in the military proceedings. (App. infra, pp. 39a-40a.) The District Court did, however, consider and reject the challenges to the manner in which the military prosecuted

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4/ Those portions of the Review dealing with issues which the lower courts found to have been given "full and fair" consideration by the military tribunals have been set forth in the Appendix.

marihuana offenses under Article 134, and the equal protection, privacy and Eighth Amendment challenges to the petitioner's conviction and sentence for possession and use of marihuana. (App. infra, pp. 42a-45a.)

During the pendency of the initial appeal to the Tenth Circuit, the Circuit Court decisions in Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973), rev'd, 418 U.S. 676 (1974) and Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd, 417 U.S. 733 (1974), holding Article 134 unconstitutional, were handed down. After these rulings were brought to its attention, the Court of Appeals entered a per curiam order reversing the District Court's decision and remanding for further proceedings on the Article 134 issue.

In November, 1973 the District Court entered its second decision. First, the court overruled the argument that the petitioner was precluded from raising the Article 134 question because it had not been presented to the military tribunals. (App., infra, pp. 17a-18a.) Turning to the merits, the District Court viewed the issue as "whether Article 134 constituted fair notice to this petitioner that marihuana offenses were proscribed." The court ruled that it could "but conclude that petitioner knew that his conduct was forbidden; that the General Article, in and of itself, was fair notice to him that his conduct was prohibited; that

petitioner, as a senior officer in command of a military unit in a combat zone knew or should have known of the General Article, and the provisions of the Manual for Courts-Martial, listing specific marihuana offenses as violations of Article 134; and that the acts with which he was charged and convicted, and under the circumstances surrounding their commission, constituted an obvious and patent violation of that portion of Article 134 prohibiting conduct to the prejudice of good order and discipline." (App., infra, p. 23a.)

An appeal from this ruling was taken and consolidated with the appeal from the District Court's initial decision. The Court of Appeals first held that the military tribunals had given "full and fair consideration" to the petitioner's claims concerning the denial of due process in the court-martial convening procedures and the violation of the Fourth Amendment, and, accordingly, that the District Court correctly refused, under the doctrine of Burns v. Wilson, 346 U.S. 137 (1953) reh. denied, 346 U.S. 844, to consider those claims. Turning to those issues which it viewed as properly before it, the Court of Appeals held that the petitioner's conviction and sentence for possession and use of marihuana did not violate constitutional guarantees of equal protection, the right of privacy or the Eighth Amendment's prohibition of cruel and unusual punishment. The Court of Appeals further held that the petitioner could validly be convicted for off-duty, social use of mari-

huana, even in the absence of a factual showing that his conduct did, in fact, prejudice good order and discipline. Finally, the Court ruled that, on its face and as applied, the use of Article 134 to punish the possession and use of marihuana charged against the petitioner was not unconstitutional.

REASONS FOR GRANTING THE WRIT

This case involves important questions concerning the proper scope of federal habeas corpus consideration of military court-martial convictions. It also raises important questions about the manner in which the military prohibits and punishes the off-duty possession and use of marihuana by military personnel.

1. This Court should resolve conflicts and uncertainty concerning the proper scope of federal habeas corpus review of court-martial convictions.

Relying on their view of the requirements of Burns v. Wilson, supra, the courts below refused to review petitioner's due process and Fourth Amendment claims, ruling instead that because "the military courts gave full and fair consideration" to these claims, the federal courts were precluded from adjudicating those issues. Petitioner submits that, at most, the Burns rule only cautions federal habeas corpus courts not to re-litigate

factual issues, that any broader reading poses serious problems, that the federal courts must be available to consider any claimed constitutional defects in a court-martial proceeding, and that the confusion over the proper scope of Burns v. Wilson requires review by this Court.

The proper scope of review should be as broad as that accorded to collateral attacks on state criminal convictions, at least where, as here, the claims are both purely legal and are of constitutional dimension. See Townsend v. Sain, 372 U.S. 293 (1963). That the doctrine of Burns v. Wilson was limited to a concern about re-litigating evidentiary issues was repeatedly emphasized in the plurality opinion: "... when a military decision has dealt fully and fairly with an allegation raised in [a petition for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence," id. at 142; the federal court should not "re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations, "id. at 144, and should not allow petitioners" to make a new record, to prove de novo in the District Court precisely the case which they failed to prove in the military courts." Id. at 146. Indeed, the Court in Burns did consider the only purely legal issue in the case - whether the rule of

McNabb v. United States, 318 U.S. 332 (1943) applied to courts-martial - even though that issue had been considered by the military tribunals, 346 U.S. at 145, n. 12. Thus, Burns is properly read as applying the "full and fair consideration" test only to factual issues, not to legal issues.

Many courts have read Burns in that fashion. See, e.g., Kauffman v. Secretary of the Air Force, 415 F.2d 991, 996-97 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970); Allen v. Van Cantfort, 436 F.2d 625, 629, n. 2 (1st Cir. 1971); Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd on other grounds, 417 U.S. 733 (1974); Mendes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971); Harris v.Ciccone, 417 F.2d 479 (8th Cir. 1969); Melvin v. Laird, 365 F.Supp. 511 (E.D.N.Y. 1973). Indeed, even within the Tenth Circuit, some cases have held that the full and fair consideration rule does not preclude consideration of constitutional issues. Compare Wallis v. O'Kier, 491 F.2d 1323, 1325 (10th Cir.), cert. denied, 419 U.S. 901 (1974) and Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967) with King v. Moseley, 430 F.2d 732 (10th Cir. 1970) and the ruling below.

Moreover, however read, the Burns doctrine has been subjected to extensive criticism. Justice Frankfurter, in an opinion on the petition for rehearing in Burns, expressed doubt "that a conviction by a constitutional

court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an ad hoc military tribunal is invulnerable." 346 U.S. at 851. Courts and commentators have questioned the premises upon which the decision was based and noted the uncertainty that it has generated. See, e.g., Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (en banc), pet. for cert. filed, 44 U.S. Law Week 3346 (Dec. 9, 1975); see generally, Developments in the Law - Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1217-25 (1970); Moyer, Justice and the Military, §§ 6-300 to 6-394 (1972). In Calley v. Callaway, after canvassing the issue, the Fifth Circuit adopted its own approach to reviewing claims that "substantial constitutional rights" have been violated in the course of military proceedings. 519 F.2d at 203.

Indeed, while the Court has cited Burns v. Wilson, for other propositions, it has not applied or reiterated the full and fair consideration doctrine. Instead, it has reaffirmed the proposition that "the writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its historical importance as the ultimate safeguard against unjustifiable deprivations of liberty." Schlessinger v. Councilman, ___ U.S. ___, 43 L.Ed.2d 591, 605 (1975).[5]

[Please see next page for footnote 5.]

The petitioner here sought to invoke that historic jurisdiction to consider due process and Fourth Amendment defects claimed to have invalidated his court-martial conviction. The courts below felt precluded from considering those issues. That refusal, in addition to the confusion and disagreement among, and even within, the Circuits, requires that this Court resolve the issues.6/

5/ Though citing Burns for the proposition that military law is a jurisprudence which exists "separate and apart," the Court's opinion in Schlessinger did not deal with the proper scope of review of a court-martial conviction. Rather, the issue there was the propriety of federal injunctive relief prior to any judgment or conviction. In that circumstance, the Court applied equivalents of the equitable doctrines of comity and exhaustion reflected in Younger v. Harris, 401 U.S. 37 (1971). Here, no such considerations are present.

6/ The review afforded to those two sets of constitutional issues in the military proceedings did not even constitute full and fair consideration under any reading of Burns. The Court of Military Review did not even discuss these issues, but merely referred to the Staff Judge Advocate's analysis.

2. <u>The courts below should have considered the petitioner's claims that serious irregularities in the convening of the court-martial deprived him of due process of law</u>.

The first set of issues which the courts below refused to consider involved the petitioner's claims that the manner by which the charges were investigated and referred to a general court-martial was grossly irregular, reflected a design to process his case differently from the normal military prosecution and deprived him of due process of law.

First, the petitioner claimed that the officer detailed to conduct the Article 32 preliminary investigation had interviewed prosecution witnesses - enlisted men testifying under grants of immunity - without the presence of petitioner or his counsel, and that, although subsequent cross-examination was available at the formal hearing, this could not cure the prejudice resulting from the crystalization of that testimony at the initial ex parte interviews. This procedure was claimed to have undermined the preliminary examination whose constitutional importance this Court has recognized. Coleman v. Alabama, 399 U.S. 1 (1970).7/

7/ Although Humphrey v. Smith, 336 U.S. 695 (1949) indicated that the failure to afford a thorough Article 32-type investigation was not "jurisdictional," see also, Harris v. Ciccone, supra, that case was decided well before this Court elevated the importance of the preliminary examination, Coleman v. Alabama, supra.

Secondly, in the processing of the charges, the petitioner's immediate commanding officer was completely by-passed, and the case was directly processed at the Headquarters, Seventh Air Force level only. This deprived the petitioner of the benefits of the substantial discretion given the immediate commander to determine whether to give the accussed the significant advantages of non-judicial punishment under Article 15 of the Code, 10 U.S.C. §815, or a special court-martial under Article 19 of the Code, 10 U.S.C. §819. Even the Staff Judge Advocate conceded that this procedure was "extraordinary in some respects."

Third, the petitioner contended that this extraordinary procedure in the processing of charges was the result of the avowed public policy of the commander, General Lucius D. Clay, Jr., to treat severely any officer accused of marihuana use. The possibility that such command influence deprived the petitioner of impartial administration of justice in the initiation of the proceedings against him raised substantial due process issues. See Kasey v. Goodwyn, 291 F.2d 174, 177 (4th Cir. 1961); Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971); cf. DeChamplain v. Lovelace, 510 F.2d 419 (8th Cir.), vacated on other grds., 421 U.S. 996 (1975).

General Clay was also the convening authority of the court-martial. Article 22 of the Code, 10 U.S.C. §822, provides that an

accuser may not convene a court-martial. The petitioner claimed that General Clay was de facto an accuser within the definition of Article 1, 10 U.S.C. §801, namely, "any person who directs that charges nominally be signed and sworn to by another," that General Clay personally directed that the charges be preferred against the petitioner, and that another general was simply the "go-between."

Finally, the petitioner claimed that the combination of these factors inexcusably tainted all of the proceedings. Shortly before the petitioner's arrest, General Clay had publicly stated that officers caught using drugs would be harshly treated; following the arrest, normal procedures were suspended, the case was considered at General Clay's level, and, at his direction, charges were preferred. Given the particular vulnerability of military tribunals to improper "command influence," see Reid v. Covert, 354 U.S. 1 (1957); O'Callahan v. Parker, 395 U.S. 259 (1969), Homcy v. Resor, supra, the possibility that such influence tainted the military proceedings here required the courts below at least to have examined these questions.

3. The courts below should have considered the petitioner's claim that his court-martial was the product of evidence seized in violation of the Fourth Amendment.

The other major issue that the courts below refused to consider was whether the petitioner's arrest and the ensuing search violated the Fourth Amendment. The issue was crucial because the evidence obtained when petitioner's car was searched after his arrest was critical to the prosecution's case, since it was the only non-testimonial evidence presented. Whether the warrantless arrest and search were lacking in probable cause should have been adjudicated by the courts below, since the issue was substantial. See Beck v. Ohio, 379 U.S. 89 (1964); United States v. Ventresca, 380 U.S. 102 (1965).

First, the "underlying circumstances from which the informant concluded that the narcotics were where he claimed they were," Aguillar v. Texas, 378 U.S. 108, 114 (1964), were insufficient to support a finding of probable cause. See, e.g., United States v. Lozaw, 427 F.2d 911 (2d Cir. 1970); United States v. Raucho-Acuna, 440 F.2d 1199 (5th Cir. 1971). Second, notwithstanding that the informant was an Army intelligence officer, neither the arresting officer nor the OSI officers had previously worked with him, they had no reason to credit his re-

liability, and their reliance on him was not sufficiently reasonable to supply probable cause. See, e.g., Wong Sun v. United States, 371 U.S. 471, 480 (1963); United States v. Upshaw, 448 F.2d 1218, 1221 (5th Cir. 1971). Finally, the attenuated manner in which the signal was communicated to the arresting officer, in a context where no warrant had been issued, further undermined the validity of the arrest. See Whiteley v. Warden, 401 U.S. 560 (1971).

Given these factors, the refusal below to consider these issues emphasizes the need for reconsideration of the Burns doctrine.

4. This Court should determine whether the military law prohibitions of marihuana offenses violate constitutional safeguards.

This case raises two contentions rejected by the courts below: first, that the manner in which the military proscribes the marihuana offenses charged against the petitioner offended constitutional prohibitions of vagueness and requirements of notice, and, second, that the punishment of the petitioner for casual, off-duty use of marihuana was unconstitutional. Neither set of issues has been specifically addressed by the Court.8/

8/ In Schlessinger v. Councilman, supra, the Court did consider a court-martial prosecution

[continued on next page]

for sale, transfer and possession of marihuana, brought under Article 134. But the vagueness issue in that context was not raised, and the related question of whether off-base, off-duty marihuana offenses are "service-connected" because of their effect on discipline, morale and fitness was not reached because of the Court's exhaustion ruling. That latter issue was discussed, however, both in the majority opinion and by the dissenting Justices, 43 L.Ed.2d at 610-11, n. 35, 613-15, and has also sparked disagreement between the military and civilian courts. Compare, United States v. Becker, 18 USCMA 563, 40 CMR 275 (1969), with Cole v. Laird, 468 F.2d 829 (5th Cir. 1972). Such questions are relevant here in two respects. First, the petitioner contends that the vagueness of the marihuana prohibition is amplified by the failure to require proof that such conduct is directly and palpably prejudicial to order and discipline. Second, the effect of marihuana use on good order and discipline is an important factor in assessing the direct constitutional claims raised here.

A. Vagueness and notice

Article 134 does not, of course, expressly prohibit the conduct with which the petitioner was charged. However, the courts below, relying on Parker v. Levy, supra and the provisions of the Manual for Courts-Martial, held that any vagueness or lack of notice was cured and that the petitioner knew or should have known that his conduct was prohibited by Article 134.

But Parker v. Levy does not necessarily dispose of the vagueness issue here. There, in the context of conduct which arguably fell within the core of Article 134's concerns - urging enlisted men to disobey combat orders - the Court "recognized that the long-standing customs and usages of the services" imparted an accepted meaning to the seemingly imprecise standards of Article 134. 417 U.S. at 746-47. Here, the charged conduct, a few instances of social use of marihuana, does not at all inherently implicate the needs of the military mission. That is why many courts have ruled that off-base possession and use of marihuana is not necessarily service-connected for O'Callahan purposes. See, e.g., Cole v. Laird, supra; Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), rev'd on other grounds sub nom, Schlessinger v. Councilman, ____ U.S. ____, 43 L.Ed.2d 591 (1975); Holder v. Richardson, 364 F. Supp. 1207 (D.D.C.

1973). Nor can two centuries of military custom and usage be referred to, since marihuana use was not even made generally criminal in civilian society until approximately fifty years ago. Indeed, the 1951 Manual for Courts-Martial did not prohibit the use of marihuana, but only its possession. See United States v. Williams, 8 USCMA 375, 23 CMR 135 (1957).

Neither does the Manual for Courts-Martial remedy the defects. Even a careful study of the Manual provisions dealing with marihuana leaves uncertainty about their precise application to the petitioner's conduct in Vietnam in 1970. To be sure, paragraph 213b of the Manual, in describing examples of "disorders and neglects to the prejudice of good order and discipline" states: "It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug." But paragraph 213c, dealing with "conduct of a nature to bring discredit upon the armed forces," makes no mention of marihuana, yet that clause was one of the bases for prosecuting the petitioner. Similarly, transfer of marihuana, with which the petitioner was also charged, is not explicitly prohibited at all in paragraph 213, and only by reading carefully through the Table of Maximum Punishments, Manual paragraph 127c, does one find a reference to "Drugs, marijuana, wrongful...transfer." Finally, since under military law the conduct charged under

Article 134 must be found to be prejudicial to good order and discipline or service-discrediting, one is thrown back to the very language whose indefiniteness is purportedly being remedied.

Perhaps the most telling demonstration of the lack of notice supplied by the General Article, the Manual, or custom and usage is that, immediately after the military judge read the text of Article 134 to the court in this case, one of its members felt compelled to inquire: "Is there anything in Air Force regulations that says marihuana is against the regulations, use and possession?" (Record of Trial, p. 222).

B. The constitutionality of prohibiting marihuana use.

The petitioner challenged his conviction for marihuana offenses on three distinct constitutional grounds, all premised on the increasing societal recognition that there is little, if any, justification for the continued criminalization of marihuana use, and that, accordingly, its prohibition is constitutionally offensive.

The equal protection argument is that, since military regulations treat marihuana offenses in essentially the same manner as narcotic drug offenses, such classification is arbitrary and irrational. There is an

increasing body of evidence which indicates that marihuana has fundamentally different and incomparably less dangerous effects than herion, opium, morphine and other addictive drugs.[9] Based on these studies, several state Supreme Courts have scrutinized their marihuana laws, and have held it impermissible under the Equal Protection Clause to classify and penalize marihuana use in the same manner as the use of narcotic drugs. People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971); State v. Zornes, 78 Wash. 2d 9, 475 P.2d 109 (1970); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); State v. Kantner, 493 P.2d 306 (Hawaii, 1973); see also English v. Miller, 341 F.Supp. 714 (E.D.Va. 1972); contra, United States v. Kiffer, 477 F.2d 349 (2d Cir. 1973).

9/ See, e.g., the report of the National Commission on Marijuana and Drug Abuse, Marijuana, A Signal of Misunderstanding, (1969); Brecher, Licit and Illicit Drugs, (1972). Many organizations, including the Consumer's Union and the American Bar Association, recommend immediate and total decriminalization of marihuana use. Several states have recently done precisely that.

Second, petitioner contended that prohibition of the use and possession of marihuana violates the constitutional right of privacy. This Court has, in recent years, delineated a zone of privacy surrounding the individual into which the state may not intrude absent a compelling need. This right has been found to protect those intimate activities of an individual with regard to which state intrusion is unthinkable. See Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969). Several courts and judges have extrapolated from these principles the conclusion that the privacy right also protects the private use of marihuana. See Ravin v. State, Alaska (1975)(17 CrL 2205); State v. Kantner, supra, 493 P.2d at 318 (dissenting opinion); People v. Sinclair, supra at 896 (concurring opinion); see contra, State v. Baker, Hawaii (1975)(17 CrL 2270).

Finally, petitioner's punishment, for a few episodes of marihuana use was a sentence of three to four years at hard labor and payment of a $15,000 fine. Such drastic punishment for conduct which is arguably constitutionally protected, and which certainly had no direct, adverse consequences on his military responsibilities is so grossly disproportionate as to violate the Eighth Amendment's prohibition of cruel and unusual, excessive punishment. See Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S.

660 (1962); Weems v. United States, 217 U.S. 349 (1910); People v. Sinclair, supra, 194 N.W.2d at 906; People v. Lorentzen, supra, 194 N.W.2d at 832.

While the nature of the military community may temper these various constitutional principles, surely the fact that the petitioner was a military officer cannot obliterate them completely. At the very least, such issues require consideration by this Court.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40 Street
New York, New York 10016
(212) 725-1222

Attorneys for Petitioner

February 1976

APPENDICES

DECISION OF THE UNITED STATES
COURT OF APPEALS FOR
THE TENTH CIRCUIT

FILED
Oct 20 1975
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 72-1649 - 74-1032 (Consol.)

COLONEL GERALD V. KEHRLI, United States Air Force (Ret.), Appellant, v. COLONEL HOMER R. SPRINKLE, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, Appellee.	Appeal From The United States District Court For the District of Kansas (D.C. # L-2164)

Joel M. Gora, American Civil Liberties Union Foundation, New York, New York (Melvin L. Wulf, American Civil Liberties Union Foundation, New York, New York, and Scott Jarvis, Topeka, Kansas, with him on the brief), for Appellant.

Guido J. Casari, Major, Office of The Judge Advocate General, United States Air Force (Robert J. Roth, United States Attorney, Bruce E. Miller and Mary K. Beck, Assistant United States Attorneys, and Bryan M. Caldwell, Captain, USAF, Office of The Judge Advocate General, of Counsel, with him on the Brief), for Appellee.

Before HILL, SETH and HOLLOWAY, Circuit Judges.

SETH, Circuit Judge.

Colonel Kehrli stands convicted by a general court-martial of three specifications of use of marijuana, two specifications of transfer of marijuana (contemporaneous with two of the episodes of use), and one specification of possession of marijuana, in violation of Article 134 of the Uniform Code of Military Justice. 10 U.S.C. §934. Trial was held in Vietnam and Colonel Kehrli was sentenced to three years at hard labor plus a fine of $15,000 or another year's confinement at hard labor in lieu of the fine.

His conviction was reviewed by a Staff Judge Advocate and the United States Air Force Court of Military Review affirmed the conviction. The United States Court of Military Appeals denied his petition for grant of review.

At the time of his court-martial, Colonel Kehrli was commanding officer of the 616th Military Airlift Support Squadron, a division of the Seventh Air Force, stationed at Tan Son Nhut Air Base near Saigon.

Having exhausted all avenues of military review, Kehrli began service of his sentence at the United States Disciplinary Barracks, Leavenworth, Kansas.

Colonel Kehrli filed a petition for a writ of habeas corpus with the United States District Court for the District of Kansas listing fifteen claims of error in his military conviction. The court denied his petition, and its opinion discussed six of the points raised. The court determined that the other points had been fully and fairly considered by the military courts and were thus beyond the scope of review permitted to the district court.

Kehrli appealed to this court (No. 72-1649), raising six issues for review. Five of those points contain the fifteen points raised in the district court, with one additional point concerning the scope of review. Just prior to oral argument in this court, the United States Court of Appeals for the

District of Columbia Circuit held Article 134 of the Uniform Code of Military Justice to be unconstitutional on its face. Avrech v. Secretary of Navy, 477 F.2d 1237 (D.C. Cir.). Shortly thereafter, the Third Circuit followed suit. Levy v. Parker, 478 F.2d 772 (3d Cir.). Counsel brought Avrech to our attention at oral argument in addition to the other points originally raised in the briefs. We remanded the case to the district court for the purpose of allowing that court to consider the question of the constitutionality of Article 134 of the UCMJ.

After full briefing of the issue, the district court again denied Kehrli's petition for writ of habeas corpus. In its opinion, the court concluded that the issue of constitutionality of Article 134 could properly be considered although it was not raised in any of the prior military or civilian proceedings. The court further held that Article 134 gave the defendant fair notice that use, transfer, and possession of marijuana was conduct proscribed thereunder. Thus the court held it was not unconstitutionally vague.

Kehrli filed an appeal from the decision of the district court on partial remand (No. 74-1032). Since there remain undecided the six issues originally raised in No. 72-1649, the two appeals have been consolidated. Briefing was suspended pending consideration by the United States Supreme Court of the Avrech and Levy decisions on writ of certiorari. The Supreme Court reversed the holdings

of the Third Circuit and the District of Columbia Circuit in Parker v. Levy, 417 U.S. 733, and Secretary of the Navy v. Avrech, 418 U.S. 676. During the course of the proceedings, Kehrli has been paroled and it appears that the confinement portion of his sentence has been commuted to two years, although he is still paying the fine imposed.

Briefly stated the acts for which Kehrli was convicted involved the use of marijuana in the presence of enlisted members of his command, and transfer of marijuana to such enlisted personnel both on and off the military base.

The first point we consider on this appeal is the proper scope of habeas corpus review by a civilian court of a court-martial conviction. In his petition for a writ of habeas corpus, Kehrli raised the following points: (1) A number of irregularities in the procedures whereby the general court-martial was convened served to deprive Kehrli of due process of law. These irregularities were improper investigation under Article 32 of the UCMJ; bypassing of Kehrli's immediate commanding officer; improper influence of command policy by command officials; and convening of the court-martial by the de facto accuser, contrary to Article 22 of the UCMJ. (2) The conviction for possession of marijuana was based on evidence seized in violation of the Fourth Amendment's ban on unreasonable searches and seizures. The district court found that these points had

been fully considered by the military courts during the military review process, and held that the doctrine of Burns v. Wilson, 346 U.S. 137, precluded any further review in the civilian courts.

In Burns, the Court noted that while civil courts do have habeas corpus jurisdiction over court-martial convictions, the scope of review is narrower than when a civil habeas corpus proceeding is involved, and stated:

> ". . . [W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence...."
> (346 U.S. at 142).

This Circuit has consistently adhered to a limited review doctrine which we consider to have been announced in Burns. We recently restated our position in King v. Moseley, 430 F.2d 732 (10th Cir.), as follows:

> "In Burns v. Wilson, ...the Court enunciated the rule that the limited function of the civil courts in reviewing a military conviction on a petition for a writ of habeas corpus, in addition to the jurisdictional issues under the prior rule, is to determine whether the military gave fair consideration to each of the petitioner's constitutional claims."

See also Smith v. McNamara, 395 F.2d 896 (10th Cir.); Kennedy v. Commandant, United States Disciplinary Barracks, 377 F.2d 339 (10th Cir.); Dixon v. United States, 237 F.2d 509 (10th Cir.).

In the case before us, we agree that the military courts gave full and fair consideration to Kehrli's claims regarding the court-martial procedures and the search and seizure. Therefore, the district court did not err in declining to consider these claims. Kehrli has presented these issues to this court for review on the merits, but such is clearly precluded.

The second point we will review is Kehrli's claim that his conviction and sentence for use and possession of marijuana violate the constitutional guarantee of equal protection, the right of privacy, and the Eighth Amendment's prohibition of cruel and unusual punishment. The district court considered these claims on the merits since they were not discussed by the military courts, although they were presented in the petition for grant of review addressed to the United States Court of Military Appeals.

The equal protection argument stems from language in the Manual for Courts-Martial which supplements the Uniform Code of Military Justice. With reference to Article 134 (10 U.S.C. §934), paragraph 312b of the Manual states: "It is a violation of this article wrongfully to possess or use marihuana or a

habit forming narcotic drug." Thus Kehrli argues that the Manual places marijuana in the same classification as habit-forming narcotics. He discusses at length the different characteristics and physiological effects of marijuana and habit-forming narcotics. Some few courts have held that classification of marijuana with habit-forming narcotics violates the principle of equal protection mandated by the Constitution. People v. McGabe, 49 Ill.2d 338, 275 N.E.2d 407; People v. Sinclair, 367 Mich.91, 194 N.W.2d 878. Similarly, State v. Zornes, 78 Wash.2d 9, 475 P.2d 109. However, the issues is not here presented because the language quoted from the Manual for Courts-Martial, § 213b does not, in itself, support the conclusion that the military has placed marijuana in the same classification as habit-forming narcotics. Further, the penalty provisions of the Manual make it clear that marijuana is treated separately and distinctly from habit-forming narcotics. Paragraph 127c, prescribes a maximum punishment for a use of marijuana at five years confinement at hard labor. A single use of habit-forming drugs carries a maximum penalty of ten years confinement at hard labor. The district court concluded that there was no classification violating the equal protection clause, and we agree.

Kehrli urges that his sentence of three years at hard labor plus a $15,000 fine or another year at hard labor for a few instances of marijuana use constitutes cruel and unusual punishment. He argues that the sentence is

excessive, Weems v. United States, 217 U.S. 349, and that it fails to take into account society's "evolving standards of decency" concerning use of marijuana, Trop v. Dulles, 356 U.S. 86. While the sentence here may seem severe, it is within the authorized maximum sentence for the convictions. We concur in the finding of the district court that Kehrli's sentence does not contravene the Eighth Amendment's prohibition of cruel and unusual punishment.

Kehrli also argues that the use of marijuana produces relatively mild, harmless effects on the user and its regulation violates the constitutional right of privacy. The district court dismissed this argument, noting that the military certainly has a vital interest in the use of drugs by service personnel in combat zones, and on or near military installations. We uphold the district court's denial of this claim for relief.

The third major point raised for our consideration is that off-duty social use of marijuana cannot be validly prosecuted under the general article, 134. Kehrli's use of marijuana was prosecuted under that article, which states in part:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to

> bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial...."

Paragraph 213b of the Manual for Courts-Martial discusses "disorders and neglects to the prejudice of good order and discipline in the armed forces." That paragraph states:

> "It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug. Possession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears."

Kehrli argues that Article 134 requires that the military make an affirmative showing that his conduct in some way actually did prejudice the good order and discipline of the armed forces. He urges that no such showing was made. In so doing he has made no challenge to the jurisdiction of the court-martial but instead he simply argues that the Government failed to prove one element of the offense. The district court, considering this claim on the merits, noted the reported effects of marihuana on the user. These include loss of coordination in the limbs, increase in pulse rate, lowering of body temperature, insatiable hunger, inflammation of the mucous membranes and bronchial tubes, exhilaration of mood,

loss of spatial sense, loss of timing, uncontrollable hilarity. The district court held that, considering the known effect of marijuana, it was not necessary for the prosecution to introduce direct evidence that Kehrli's use and transfer of marijuana on and near the air base in Vietnam acted to prejudice good order and discipline. We agree. The prejudice to good order and discipline, in the circumstances of this case, is evident.

As a fourth point, it is argued that the appellate review of Kehrli's conviction in the military courts was defective. Appellant states that he was not permitted to travel to consult with one of his defense counsels; that his attorney was not given extra time away from his other litigation responsibilities to prepare a brief for the Air Force Court of Review; and that the review of the Convening Authority was dated the same day as that of the Staff Judge Advocate so that it could not possibly be adeaute.

Appellant had two attorneys who prepared his appeal to the Air Force Court of Military Review. They briefed and presented nine separate claims of error. The record shows that appellant's case received full consideration through the stages of military review. Additionally, as the district court noted, appellant has made no showing of actual prejudice from these alleged defects. The appellate review provided by the military court system in this case meets constitutional standards.

On our initial hearing of this appeal, as mentioned above, we remanded the case to the district court to allow that court to rule on the question of whether Article 134 of the UCMJ was unconstitutionally vague. The district court rejected the contention that the Article was unconstitutional on its face, and went on to hold that it was also not unconstitutionally applied to Colonel Kehrli in this case. Kehrli argues on this appeal following the remand that the general article, Article 134 UCMJ, is unconstitutional on its face. In the alternative he contends that it is unconstitutional as applied to him in this instance.

As we noted above, the Supreme Court reversed decisions of the District of Columbia Circuit and the Third Circuit which had held Article 134 to be unconstitutional on its face. Secretary of the Navy v. Avrech, 418 U.S. 676; Parker v. Levy, 417 U.S. 733. The Court in Levy held that Articles 133 and 134 of the UCMJ withstand a constitutional challenge on grounds of vagueness, although there may be areas of uncertainty under both articles. The opinion then goes on to find that the conduct for which Levy was prosecuted falls within the range of conduct which is governed by Articles 133 and 134 without vagueness or imprecision. Levy was reaffirmed less than a month later in Avrech, where the Court held that Article 134 of the UCMJ is constitutional on its face, relying on Levy. We find these two decisions to be clearly dispositive of Kehrli's claim of facial invalidity of Article 134.

The application argument is intermixed with the several separate constitutional points considered above, and no separate discussion is required here. We find no unconstitutional aspect in its application to the charges against Kehrli.

The district court followed a rationale similar to that used in Levy in holding that Article 134 by itself, and as fleshed out by the Manual for Courts-Martial, was fair notice to Colonel Kehrli that use, possession, and transfer of marijuana was prohibited thereunder. The trial court noted further that Article 137 of the UCMJ would require Colonel Kehrli to explain the provisions of Article 134 to his enlisted personnel at regular intervals. Kehrli has never claimed that he in fact did not know that use of marijuana was a violation of Article 134. The district court concluded: "A person of ordinary intelligence, having the background of Colonel Kehrli, would have fair notice of what conduct was proscribed by Article 134, and would have known that the specific conduct was prohibited." We agree that the use of marijuana, which is specifically mentioned in Paragraph 213b of the Manual for Courts-Martial, and for which a maximum penalty is prescribed in the Manual's Table of Maximum Punishments, Paragraph 127c, may be constitutionally prosecuted under Article 134 UCMJ.

Appellee argued in the district court on the partial remand, although it is not now argued on appeal, that the issue of constitu-

tionality of Article 134, facially and as applied, could not be raised because it was never raised in the military courts. Thus, appellee stated that the court was precluded from consideration of the constitutionality issue by the doctrines of waiver, exhaustion, and the scope of review of the civilian courts. The district court on remand held, we feel correctly, that the issue was properly before the court since it would have been futile to raise it in the military courts prior to the Circuit Court decisions in Avrech and Levy. It appears that at this point it is not possible for Kehrli to go back to the military courts to present this claim. Exhaustion and waiver would thus appear not to be applicable. Fay v. Noia, 372 U.S. 391. We mention this point now because of the decision of the Supreme Court in Schlesinger v. Councilman, 420 U.S. 738. Although that case involved intervention by means of an injunction in a court-martial proceeding by a civilian court before the court-martial took place, the opinion appears to require complete exhaustion of military remedies before allowing civilian courts to consider a claim. Because of the recent decisions in Levy and Avrech, we do not read Councilman to preclude our consideration of the question of constitutionality of Article 134.

We have considered all of the points raised on the consolidated appeals. The decisions of the district court denying appellant's petition for writ of habeas corpus are AFFIRMED.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ON REMAND

FILED
Nov 27 1973
Arthur G. Johnson, Clerk
By_____, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COLONEL GERALD V. KEHRLI, Petitioner,	)	
v.	)	No. L-2164
COLONEL HOMER R. SPRINKLE, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, Respondent.	)	

MEMORANDUM AND ORDER

This is an action in habeas corpus, commenced by the petitioner while he was a prisoner at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, in custody of the respondent. He was paroled May 25, 1973, after serving 16 months of a sentence of three years confinement at hard labor and a

$15,000.00 fine, and to be further confined until the fine is paid but not for more than one additional year, imposed upon his conviction by a General Court Martial of three charges of wrongful use of marihuana, one charge of wrongful possession of marihuana, and two charges of the wrongful transfer of marihuana to another, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C.A. § 934. Petitioner initially raised some fifteen claims; upon review of those this court concluded that he was not entitled to the relief sought, and dismissed the action. Appeal was taken to the Tenth Circuit and during the pendency of that appeal, the decisions in Avrech v. The Secretary of The Navy, 477 F.2d 1237 (D.C. Cir. 1973) and Levy v. Parker, 478 F.2d 772 (3d Cir. 1973) were announced. These were brought to the attention of the Circuit, where the constitutionality of Article 134 was challenged by petition for the first time on appeal. The Circuit then reversed and remanded, to give an opportunity to the trial court to consider the matter.

Very thorough and extensive briefs have been filed by both parties. An evidentiary hearing has not been requested, and does not appear necessary, since there is no factual dispute relative to this issue.

A brief summary of the prosecution's evidence was set forth in this court's earlier Memorandum; it need not be repeated in full here. Suffice it to say that petitioner, a colonel in the United States Air Force with more than twenty years service, and at the time the Commanding Officer of the 616th Military

Airlift Support Squadron, stationed at the Tan Son Nhut Air Base, near Saigon, Republic of Vietnam, was shown to have smoked marihuana at his quarters on the Air Base with various enlisted members of his command. On some occasions, petitioner provided the marihuana and distributed it to the other persons present; at other times it was provided by other men; petitioner was shown to have used marihuana on each of those occasions, and twice in vehicles occupied by enlisted men, during off duty hours. It was also shown that petitioner smoked and possessed marihuana in the presence of a junior officer, assigned to United States Army Intelligence.

The matter of the constitutionality of Article 134 was not raised on petitioner's behalf at any stage of the military proceedings. He contends that he is entitled to make the claim that Article 134 is unconstitutionally vague, in this court, notwithstanding the fact that he did not make that argument during the military proceedings. Respondent contends that petitioner is barred from raising that issue in this court for three reasons: because the issue is outside the scope of review of civilian courts over military courts; because he failed to exhaust his military remedies; and because his failure to raise the issues before the military courts amounted to a waiver.

Petitioner denies that his failure to raise the issue before the military courts constituted a waiver; he contends that it would have been futile to do so. He points to the line of decisions of the military courts which hold Article 134 to be constitutional and valid, concluding with the decision handed down by the United

States Court of Military Appeals on April 2, 1973, in U. S. v. Unrue, Case No. 26,552, decided after Avrech, supra. A deliberate withholding of a constitutional claim during the course of litigation amounts to a waiver of that claim. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938). Federal courts have discretion to deny habeas relief to a state prisoner who has deliberately by-passed state avenues of relief, and who then seeks federal habeas. Fay v. Noia, 372 U.S. 391 (1963). Kehrli did not by-pass any of the avenues of appeal open to him; he has exhausted all of the avenues open to him through the military courts. However, he did not raise the issue here presented at any time during his court martial, or during his military appeals. The military courts have consistently, in unrelated cases, held adversely to his claim. A petitioner ought not to be required to perform a futile act. His application should not be denied on the grounds of waiver.

Turning to the question of exhaustion, it is true that Kehrli could have raised the issue at any time in the military courts. A state prisoner is required to exhaust the remedies available to him in the courts of the state in order that state courts may have the first opportunity to consider the claim. Likewise, a military prisoner should be required to exhaust the remedies available to him in the military courts. The review of Kehrli's conviction by the military courts is now complete. State courts exercise general habeas jurisdiction, and many states provide specific proced-

ures for post-conviction relief. The military courts, on the other hand, have not generally exercised general habeas jurisdiction. Those instances in which post-conviction relief has been suggested, required or afforded, appear to be instances in which the military courts have not yet completed their direct review. This court is unaware of the exercise of habeas jurisdiction by the military courts in instances wherein those courts had further review power. Accordingly, this court concludes that petitioner need not be required to apply to the military courts for post-conviction relief at this stage, since it appears doubtful that those courts have procedural facilities to afford him the relief sought.

We turn now to respondent's contention that petitioner's claim is outside the scope of review by this court, because the issue is not one which was raised during the court-martial trial or in the military courts. Our review is limited in scope. The court in Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967) said:

> ...the range of inquiry in acting upon applications for habeas corpus from persons confined by sentence of military courts is more narrow than in civil cases. ..."From early times, our courts have recognized that the Constitution confers upon Congress, and not the courts, the power to provide for the trial and disposition of offenses commited by those in the armed forces and that the civil courts are limited to a consideration of the jurisdiction of courts-martial and that they have no

supervisory or correcting power over their decisions." ..."However, in military habeas corpus the civil courts have jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution." ...Where the constitutional issue involves a factual determination, our inquiry is limited to whether the military court gave full and fair consideration to the constitutional questions presented. It is not our duty to re-examine and reweigh each item of evidence which tends to prove or disprove the allegations in the petition for habeas corpus. (emphasis supplied)

Further discussions of the limitations of review by civil courts of military convictions is found in Burns v. Wilson, 346 U.S. 137, rehearing denied 346 U.S. 844 (1953); King v. Moseley, 430 F.2d 732 (10th Cir. 1970); and Suttles v. Davis, 215 F.2d 760 (10th Cir. 1954). As the court observed in Suttles, "Obviously, it cannot be said that (the military courts) have refused to fairly consider claims not asserted." Here, the claim not having been presented, military courts had no opportunity to consider it.

The issue here raised is one of law. It involves no factual determination. Petitioner has no remedy available to him in the military courts comparable to the motion to vacate available to civilian prisoners under 28 U.S.C.A. § 2255. No habeas is available to him through the military courts, as pointed out above, since the military courts exercise no independent habeas jurisdiction. This court concludes that

it has jurisdiction to determine, as a matter of law, whether petitioner "was denied any basic right guaranteed to him by the Constitution."

Petitioner's attack upon the General Article is based upon the recent Circuit decisions in Avrech v. The Secretary of The Navy, supra. The Answer and Return indicates that certiorari is being sought in both cases. It has been granted in Avrech. The Secretary of the Navy v. Avrech, 42 Law Week 1052, 3173 (Case No. 72-1713). The question presented is the same as is raised here: Is General Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, unconstitutionally vague? The District of Columbia and Third Circuit decisions, persuasive as they may be, are not controlling in this Circuit.

The offenses of which Levy and Avrech stand convicted are quite different from those of which Colonel Kehrli was convicted, and the military background and experience of each of those defendants does not compare to that of a career officer such as petitioner. Levy was convicted of "uttering public statements designed to promote disloyalty and disaffection among the troops" and "wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful and disloyal statements" to enlisted personnel, in violation of Articles 133 and 134. Avrech was convicted of "attempting to publish a statement disloyal to the United States, with design to promote disloyalty and disaffection among the troops," in violation of Article 134. Both the utterances in Levy and the writing in Avrech were

concerned with the United States' involvement in the Vietnam war. Captain Levy was an army doctor on active duty; Avrech was a PFC in the Marines and had been in service for two years.

Colonel Kehrli had been a commissioned officer on duty in the Air Force for more than twenty years. The wrongful possession and use of marihuana has long been included in the manual for Courts-Martial as a specific offense under Article 134. Kehrli makes no argument that he was unaware that this offense was included within the list of offenses punishable under Article 134; indeed, viewing his long military experience, it would be difficult to conclude that Colonel Kehrli was unaware that the possession or use of marihuana was so included.

Article 134 proscribes "all disorders... to the prejudice of good order and discipline in the Armed Forces, (and) all conduct of a nature to bring discredit upon the armed forces." A statute defining an offense must give a person of ordinary intelligence fair notice of what conduct is proscribed. It must be sufficiently clear and definite so that by reasonable construction one may know if the contemplated conduct is forbidden. U. S. v. Harriss, 347 U.S. 612 (1954); U. S. v. Linn, 438 F.2d 456 (10th Cir. 1971).

Kehrli argued, in claim number 12 presented to this court previously, that the evidence in the case failed to establish that his conduct was "to the prejudice of good order and discipline in the armed forces" or "conduct of a nature to bring discredit upon the armed forces."

The matter was discussed at length in the court's earlier Memorandum, and the court there concluded that it was not necessary for the prosecution to introduce direct and specific evidence of "prejudice of good order and discipline" or of "conduct (bringing) discredit upon the armed forces" other than evidence of petitioner's use, possession and transfer of the drug to others, in and about his military station, which was on a military base in a combat zone.

The question before this court is whether Article 134 constituted fair notice to this petitioner that marihuana offenses were proscribed. This court can but conclude that petitioner knew that his conduct was forbidden; that the Genral Article, in and of itself, was fair notice to him that his conduct was prohibited; that petitioner, as a senior officer in command of a military unit in a combat zone knew or should have known of the General Article, and the provisions of the manual for Courts-Martial, listing specific marihuana offenses as violations of Article 134; and that the acts with which he was charged and convicted, and under the circumstances surrounding their commission, constituted an obvious and patent violation of that portion of Article 134 prohibiting conduct of the prejudice of good order and discipline.

Article 134 is one of those articles which must be explained to enlisted men with regularity; Article 137 so requires. Further, Article 137 provides that a complete text of the Uniform Code of Military Justice and of the regulations prescribed by the President thereunder (the Manual for Courts-Martial) are required to be made avail-

able to any person on active duty upon his request, for his personal examination. Colonel Kehrli, as squadron commander, would be charged with compliance with Article 137. If any members of the armed forces should be familiar with the Uniform Code of Military Justice, and with the acts therein proscribed, certainly officers in command status should be. This court need not concern itself with unforseen offenses, charged against newly enlisted members of the armed forces as violations of Article 134; such proceedings may be dealt with by the courts as they arise; they have no relevance here.

Article 134, obviously, is broad. The court can conceive of many situations in which such a regulation would be necessary in the government of the military forces of this nation. Perhaps it may be subject to some abuse; such abuses can be remedied readily by the courts, military or civil, should they arise. The military courts provide in the first instance the proper forum in which a determination should be made as to whether acts constitute conduct to the prejudice of good order and discipline, or conduct of a nature to bring discredit upon the armed forces. Swaim v. U. S., 165 U.S. 553 (1896).

The facts in this case do not illustrate any unfairness, or any want of prior notice to or knowledge of the petitioner that the conduct was violative of the General Article. A person of ordinary intelligence, having the background of Colonel Kehrli, would have fair notice of what conduct was proscribed by Article 134, and would have known that the specific conduct was

prohibited. The court holds that in the context and upon the facts here presented, Article 134 is constitutional and valid. Dynes v. Hoover, 61 U.S. 65 (1858).

The court concludes for the reasons stated in this Memorandum and Order, and in its earlier Memorandum and Order herein filed, that petitioner is not entitled to the relief sought, and that this action should be dismissed.

IT IS SO ORDERED. The clerk is directed to transmit copies of this Memorandum and Order to counsel of record.

Dated at Topeka, Kansas this 26th day of November, 1973.

GEORGE TEMPLAR
UNITED STATES DISTRICT JUDGE

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

UNITED STATES DISTRICT COURT
For The
DISTRICT OF KANSAS

Civil Action File
No. L-2164

COLONEL GERALD V. KEHRLI,

Petitioner,

vs. JUDGMENT

COLONEL HOMER R. SPRINKLE, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent.

This action came before the Court, Honorable George Templar, United States District Judge, presiding, and a decision having been duly rendered.

It is Ordered and Adjudged that all relief be denied and the action be, and it is hereby, dismissed.

Dated at Topeka, Kansas, this 27th day of November, 1973

Entered in the docket 11-27-73

ARTHUR G. JOHNSON
Clerk of the Court

By_____
Deputy

PER CURIAM DECISION ON THE
UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit
MAY 3 1973

HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 72-1649 - MARCH 1973 TERM

COLONEL GERALD V. KEHRLI, United States Air Force (Ret.), Appellant,	)	Appeal From The United States District Court For The District of Kansas (D.C. #L-2164)
v.	)	
COLONEL HOMER R. SPRINKLE, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, Appellee.	)	

Joel M. Gora, New York, New York (Melvin L. Wulf, New York, New York, and Scott Jarvis, Topeka, Kansas, with him on the Brief), for Appellant.

Guido J. Casari, Major, Office of the Judge Advocate General, United States Air Force (Robert J. Roth, United States Attorney, and Bruce E. Miller, Assistant United States Attorney, with him on the Brief), for Appellee.

Before PHILLIPS, SETH and HOLLOWAY, Circuit Judges.

PER CURIAM.

F I L E D

MAY 7 1973

ARTHUR G. JOHNSON, Clerk
by_____ Deputy

Before this court on the appeal of this habeas corpus proceeding, the constitutionality of Article 134 of the Uniform Code of Military Justice became a significant issue. Whether or not the Article was unconstitutionally vague came to the forefront with the decision in Avrech v. Secretary of the Navy, No. 71-1841, decided March 20, 1973, 41 U.S.L. Week 2497. In an opinion written by Mr. Justice Clark, the United States Court of Appeals for the District of Columbia Circuit there held Article 134 to be unconstitutionally vague.

This issue does not appear to have been presented to the trial court as it was raised directly for the first time on appeal. Since this is now a significant and fundamental issue, it is necessary that the case be remanded to give an opportunity to the trial court to consider the matter.

REVERSED and REMANDED.

ORIGINAL DECISION OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

F I L E D
JUL 20 1972

ARTHUR G. JOHNSON, Clerk
By_____

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

COLONEL GERALD V. KEHRLI,
United States Air Force,
(Ret.) 540-22-2884,

Petitioner,

v. No. L-2164

COLONEL HOMER R. SPRINKLE,
Commandant, United States
Disciplinary Barracks,
Fort Leavenworth, Kansas,

Respondent.

MEMORANDUM AND ORDER

Petitioner has filed with the Clerk of this Court an application for writ of habeas corpus. Accompanying the application is an extensive memorandum brief, a copy of the Staff Judge Advocate's Review, a copy of the decision of the United States Air Force Court

of Military Review upon petitioner's direct appeal, and the record of trial by General Court Martial. These documents total some five or six hundred pages. Upon examination of them, the Court makes the following findings and order.

It appears from the application that Kehrli is presently in the custody of the respondent, Colonel Homer R. Sprinkle, Commandant of the United States Disciplinary Barracks at Fort Leavenworth, Kansas, by or under color of authority of the United States, by virtue of a sentence of three years confinement at hard labor and a $15,000 fine, and to be further confined until the fine is paid but not for more than one additional year, upon his conviction of three charges of wrongful use of marihuana, one charge of wrongful possession of marihuana, two charges of wrongful transfer of marihuana to another, and one charge of the wrongful solicitation of another to transfer marihuana. The sentence and fine were imposed upon petitioner on February 16, 1971, by a General Court Martial convened at the Tan Son Nhut Air Base, Republic of Vietnam. The conviction upon the charge of wrongful solicitation of another to transfer marihuana was disapproved; otherwise, the convictions, sentence and fine were approved. The conviction was reviewed extensively, both at the command level and upon appeal to the United States Air Force Court of Military Review. Kehrli filed a petition for grant of review with the United States Court of Military Appeals, and that Court on January 19, 1972 denied the petition. It thus appears that petitioner has exhausted the remedies

available to him for direct review within the military court system.

The grounds upon which petitioner contends he is being held in custody unlawfully are summarized as follows:

Claim No. 1. The officer exercising summary and special court martial jurisdiction was completely by-passed. No charges were referred to him for consideration. Petitioner claims that this denied him the right to have the case considered at the lowest possible level.

Claim No. 2. Under the announced policy and direction of General Lucius D. Clay, Jr., the convening authority, marihuana cases involving lower ranking personnel were disposed of administratively or through non-judicial action, while those involving officers were referred to general courts martial. Petitioner claims that this subjected him to invidious discrimination and selective law enforcement.

Claim No. 3. The court-martial lacked jurisdiction because the convening authority was the de facto accuser.

Claim No. 4. The investigating officer interviewed the primary witnesses prior to the Article 32 hearing.

Claim No. 5. The arrest and search of petitioner were made without probable cause, in violation of the Fourth Amendment.

Claim No. 6. The imposition of extra punishment in lieu of payment of the fine denies petitioner the equal protection of the laws.

Claim No. 7. The imposition of a fine was not within the instructions of the Court.

Claim No. 8. The court's instructions announced a wrong - and excessive - possible maximum period of confinement.

Claim No. 9. Petitioner claims that he was denied the effective assistance of counsel upon his appeal to the Air Force Court of Military Review.

Claim No. 10. The petitioner claims that he was denied fair appellate consideration because of the speed of appellate review at command level.

Claim No. 11. The Staff Judge Advocate's post-trial review so distorted the evidence as to deprive petitioner of impartial clemency consideration.

Claim No. 12. The evidence was insufficient to sustain a conviction under Article 134 (10 U.S.C. § 934).

Claim No. 13. Petitioner claims that Military Regulations treat marihuana almost identically with "hard" narcotics, and that such a classification is irrational and overindusive, and contrary to the principles of equal protection.

Claim No. 14. The punishment imposed is grossly disproportionate to the gravity of the offense and thus constitutes cruel and unusual punishment.

Claim No. 15. His conviction of an offense for the private, off-duty use of a relatively harmless substance offends his constitutional right of privacy; there is no compelling governmental interest.

A brief statement of the prosecution's evidence is as follows. During the fall of 1970, petitioner, a full colonel, was the commanding officer of the 616th Military Airlift Support Squadron, stationed at the Tan Son Nhut Air Base, near Saigon, Republic of Vietnam. Petitioner's quarters were on the base, near the base chapel. Five members of the squadron, all enlisted men, testified that on various occasions they had been invited by petitioner to his quarters; on each occasion, no officers other than petitioner are shown to have been present; and on each occasion marihuana was smoked by Kehrli and by most if not all of those present. On some occasions the marihuana was provided by petitioner and given by him to the witnesses; at other times it was provided by others present; each time Kehrli smoked it with them. One witness testified that he had twice purchase marihuana for petitioner, once at his specific request. These witnesses also testified that petitioner twice smoked marihuana in vehicles occupied by enlisted men, during off-duty hours. These witnesses were an Airman First Class, three Sergeants, and one Staff Sergeant; all testified under a grant of immunity.

First Lieutenant Jackson, assigned to United States Army Intelligence, met Kehrli on October 1, 1970, and had dinner with him that evening. The drug abuse problem was discussed and Kehrli stated that he had used marihuana himself; that he preferred that his men use marihuana rather than alcohol because the marihuana smokers always made it to work the next day and the drinkers might not; and that he had converted a young Captain in his unit to the use of marihuana, and had smoked with him. Later that evening, Kehrli smoked two cigarettes which the witness was positive were marihuana. Jackson reported on Kehrli's activities, upon return to his unit the following day. Jackson, at petitioner's invitation, met him again on November 20th. Prior to the meeting, Jackson arranged with OSI Special Agents to signal them if the witness "felt that the Colonel did in fact have marihuana in his possession...." Jackson and Kehrli went to Kehrli's quarters. The petitioner told Jackson that one Butch Miller would be over to give him some marihuana, but if Miller didn't show up, he had four in his room and two apiece would be more than enough. Miller didn't show up. Just before Jackson and petitioner left the quarters to go to the VNAF Club, petitioner entered his bedroom area and returned holding a Salem cigarette pack in his hand. It was crumpled and open. Petitioner said that "we would go from there to the VNAF Club, smoke two in the parking lot, go downtown and have a few drinks and smoke two downtown." Jackson gave the prearranged signal, petitioner was arrested in his vehicle, and as he emerged from the vehicle, the arresting officer saw a cigarette pack fall from his hand to the door ledge of the car. The

pack was retrieved and found to contain four cigarettes. These were given a laboratory examination and were found to be marihuana.

This Court's jurisdiction to review petitioner's conviction is a limited one. Our range of inquiry in acting upon applications for habeas corpus from persons confined by sentence of military courts is more narrow than in reviewing those arising in civil courts. The Constitution confers upon Congress, and not the courts, the power to provide for the trial and disposition of military-connected offenses, and civil courts are limited to a consideration of the jurisdiction of the courts-martial, and to a determination of whether the accused was denied any basic right guaranteed to him by the Constitution. Civil courts have no supervisory or correcting power over the decisions of military courts. Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967); Dixon v. United States, 237 F.2d 509 (10th Cir. 1956). Federal habeas courts do not sit as a "super" court of military appeals.

> "Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly

entrusted that task to Congress. ...

"The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings -- of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are 'final' and 'binding' upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner.... But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. ...

" ... It is the limited function of the civil courts to determine whether the military have given fair consideration to each (of petitioner's claims) ... ."

Burns v. Wilson, 346 U.S. 137, 140, 142, 144, 97 L.Ed. 1508, 73 S.Ct. 1045 (1952).

Where the record shows that there has been a fair consideration of a constitutional claim by the military upon full presentation of the facts and law within the meaning of Burns v. Wilson, supra, the issues cannot be reviewed by the civil courts. King v. Moseley, 430 F.2d 732 (10th Cir. 1970). Further, the doctrines of deliberate bypass or waiver, as well as that of exhaustion, limits collateral review of military convictions and confinements as it does collateral review of civilian confinements. These doctrines "encourage full use of state or military remedies before resort to the federal courts for collateral review. In either context one challenging the validity of his restraint must exhaust all available state or military remedies before seeking federal collateral relief". Angle v. Laird, 429 F.2d 892 (10th Cir. 1970); and see Noyd v. Bond, 395 U.S. 683, 23 L.Ed.2d 631, 89 S.Ct. 1867 (1969).

We turn now to petitioner's claims. Those listed above, numbered one, two, three, four, five and eight, were raised by motion at trial. Claim No. 4 was discussed at length by the Staff Judge Advocate in his Review (page 3 of Exhibit A, attached to the Complaint herein). He discussed the facts, the applicable law, and determined that absent any showing of prejudice, the action of the Article 32 Investigating Officer was entirely proper. Claim No. 1 was also discussed at length by the Staff Judge Advocate (pages 3 and 4 of his Review) as were Claims numbered 2 and 3 (pages 4-6 of the Review), Claim No. 5 (pages 6-8 of the Review), and Claim No. 8 (page 20 of the Review). The facts, the applicable law and the reasoning of the Staff Judge Advocate are clearly set forth. Petitioner

contends that the wrong result was reached in each instance; the record, however, shows full and fair consideration. The Court of Military Review stated:

> We have been presented with nine assertions of error -- five by the individual trial defense counsel and four by the appellate defense counsel. In a very fine review, the Staff Judge Advocate has fully discussed the subject matter involved in six of these assertions of error and correctly resolved them adversely to the accused. We adopt his rationale and conclusions of these issues and deem further discussion to be unnecessary.

Petitioner is apparently critical of the opinion of the Court of Military Review, stating

> " ... The opinion only discussed a few of the many issues raised by the petitioner and deffered to the Staff Judge Advocate's review on the majority of issues."

That the Court adopted the rationale and conclusions of the Staff Judge Advocate without further discussion does not indicate that the Court did not give full and fair consideration to the claims of the petitioner. The Court states that the subject matter was "fully discussed" and "correctly resolved." There is no requirement that an Appellate Court reiterate what has already been said at a lower level, if it agrees with the prior determination which is of record and is readily available to the interested parties.

Petitioner's claims numbered 6, 7 and 11 were raised on appeal before the United States Air Force Court of Military Review. The Court discusses the facts of each contention, together with the applicable statutory and decisional law. The issues were raised, presented on petitioner's behalf, and were given full discussion by the Court. The Court determined that the fine was properly assessed under applicable military law, and that the portion of the sentence providing for confinement in lieu of payment of the fine is not proscribed by the Constitution as discrimination against the non-wealthy accused. The Court held two recent Supreme Court cases, relied upon by petitioner, as inapplicable and nondispositive of the issue before the Court. It found that the comments of the Staff Judge Advocate were founded on competent evidence; that they "told it like it is" and were well within the reasonable bounds of his discretion. These issues were given the requisite "full and fair" consideration.

Claims numbered 9, 10, 12, 13 and 14 do not appear to have been raised on direct appeal. Petitioner does not contend that any of these points were raised and were overlooked or ignored by the Court of Military Review. The time for complaint was then, not now. However, in view of his claim that he was denied the effective assistance of counsel upon his appeal, --- though petitioner does not state that these matters would have been presented in any event -- this Court concludes that it will review these claims on their merits.

He contends, by Claim No. 10, that he was denied fair appellate consideration because of

the speed of appellate review at command level. The thoroughness of the Staff Judge Advocate review belies any claim of want of a fair and full appellate review at that level. The mere fact that the Review, the convening authority and the court-martial order were dated the same day does not establish unfairness. It is to be expected that the convening authority place some reliance upon the review by the Staff Judge Advocate or Legal Officer. The opinion or opinions of such officers are made a part of the record. 10 U.S.C. § 865 (Article 65). 10 U.S.C. § 864 (Article 64) requires the approval of the convening authority; the length of his review is immaterial. This Court sees no reason why the convening authority's review, aided by the above review of the Staff Judge Advocate, could not have been completed promptly.

Claim No. 12 is a contention that the evidence in the case fails to establish that petitioner's conduct was "to the prejudice of good order and discipline in the armed forces" or "conduct of a nature to bring discredit upon the armed forces". The evidence establishes petitioner's use, possession and transfer to others, on a military base in a combat zone, of marihuana. Petitioner contends that the substance is harmless, inoffensive, and mild, that its use is a wholly private matter. Petitioner's Brief quotes from Fact Sheets, Bureau of Narcotics and Dangerous Drugs, 1969, and from Marihuana: A Signal of Misunderstanding, National Commission on Marihuana and Drug Abuse, 1972. Fact Sheets, page 23, reads as follows:

> Effects of Marihuana
>
> When smoked, marihuana appears to enter the bloodstream quickly because

> the onset of symptoms is rapid. It affects the user's mood and thinking ...
>
> ... Its effects can last from two to four hours. The immediate physical effects ... may include some loss in coordination of the limbs. There is an increase in pulse rate, sometimes an abnormal lowering of body temperature, an insatiable hunger, or inflammation of the muous membranes and bronchial tubes. Other effects may include fantasy, exhilaration of mood; the feeling of being above reality; less (sic) of spatial sense; a loss of timing and an often uncontrollable hilarity. When larger doses are used, extremely vivid hallucinations often occur. There may be panic and an inordinate fear of death, illusions, and periods of paranoia ... .

Similar quotations may be found in Marihuana: A Signal of Misunderstanding, pages 55-66. Marihuana is a "Controlled Substance"; its importation and sale in this country is barred by federal law. Congress has determined that the illegal importation, distribution, possession and improper use of marihuana (among other controlled substances) has "a substantial and detrimental effect on the health and general welfare of the American people". 21 U.S.C. § 801. Its effects are well know, as indicated in Fact Sheets, supra. This Court concludes that it was not necessary for the prosecution to introduce direct and specific evidence of

"prejudice of good order and discipline" or of "conduct (bringing)discredit upon the armed forces" other than evidence of petitioner's use, possession and transfer of the drug to others, in and about his military station.

Claim No. 13 relates to the "classification" of marihuana by Military Regulations. The Regulations do not classify marihuana as a narcotic drug. They simply state that the possession or use of marihuana and narcotic drugs are proscribed. Mere possession of "controlled substances" -- including both narcotics and marihuana, Schedule I controlled substances -- is uniformly punishable under 21 U.S.C. § 844. Transfers of narcotics, however, subject the transgressor to much more serious penalties than the transfer of marihuana. 21 U.S.C. § 841(b). So it is with the Military Regulations; the penalty for marihuana offenses is much less than that for offenses involving narcotics. The Regulations contain no classification violative of equal protection.

Petitioner contends, by Claim No. 14, that the punishment is disproportionate to the offense. There is no question but that the sentence imposed is well within the authorized maximum. Federal statutes provide a maximum sentence of five years imprisonment and (21 U.S.C. § 841(b(1)(B)), and a maximum of one year imprisonment and a fine of $5,000.00 for simple possession (21 U.S.C. § 844(a)). The offenses were committed by a senior military officer, in a combat zone, on or proximate to a military installation, in the presence of a number of enlisted men, presumably much younger than petitioner. The Court concludes that the sentence imposed is not excessive.

Petitioner contends by Claim No. 15 that his constitutional right to privacy is superior to any governmental interest in his private possession and use of marihuana. What has been said, above, as to Claims No. 12 and 14, disposes also of this issue. The Government has, and should have, a vital interest in the use of drugs -- be they marihuana, narcotic, depressant, hypnotic, stimulant, hallucinogenic or otherwise -- by its servicemen, particularly in combat zones on or near its military installations.

Finally, turning to petitioner's claim of the denial of the effective assistance of counsel upon his appeal, the record indicates that two counsel presented and briefed nine claims of error before the Court of Military Review. Petitioner does not claim want of counsel before and during trial; his only claim in this regard is that he and his trial counsel were not permitted to travel to and confer with each other in person during the pendency of the appeal. No facts are stated by petitioner which demonstrate or indicate prejudice, and the Court is unable to discern any. Federal and state prisoners are oftentimes incarcerated during the pendency of appeals, and confer other than in person. The Court knows of no ruling that requires the Government to transport a prisoner to confer with appellate counsel, or to provide transportation for counsel to confer with his client pending appeal, so long as other lines of communication are open between them. There is no complaint here in this regard. Further, petitioner had additional appellate counsel, and makes no complaint of want of communication with

him. Briefs were filed by both counsel and each raised separate assertions of error. The Court takes judicial notice that appellate counsel are frequently many miles distant from their clients. So long as complete trial records are provided and lines of communication by mail or otherwise are open, no prejudice need result. None is shown here. The petitioner complains also that his trial counsel was not relieved of his other duties pending presentation of petitioner's appeal. Again, petitioner states no facts showing prejudice. If counsel were unable to properly present the appeal, the time for complaint was while the matter was before the military appellate court - not now.

The Court concludes that petitioner is not entitled to the relief sought, and that the application must be denied.

IT IS ORDERED that the relief sought by petitioner be denied, and that this case be dismissed. The Clerk is directed to transmit copies to petitioner, to his counsel of record, and to the United States Attorney for the District of Kansas.

Dated at Topeka, Kansas, this 20th day of July, 1972.

GEORGE TEMPLAR
UNITED STATES DISTRICT JUDGE

ORDER OF THE COURT OF MILITARY APPEALS, DENYING PETITION FOR REVIEW

UNITED STATES COURT
OF MILITARY APPEALS
FILED JAN 19 1972
CERTIFIED TO BE A TRUE COPY
ALFRED C. PROULY
Clerk

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, Appellee,	)	No. 24,682
v.	)	
COLONEL GERALD V. KEHRLI, (540-22-2884 FR), Appellant	)	ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Court of Military Review in case No. ACM 20886 of the United States Air Force, it is, by the Court, this 19th day of January 1972,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: The Judge Advocate General
Sanford Jay Rosen, Esquire
Melvin L. Wulf, Esquire
Joel M. Gora, Esquire
Col George M. Wilson
Lt Col Norman L. Paul
Appellate Defense Counsel
Col Henry R. Lockington
Capt Bruce D. Viles
Appellate Government Counsel

OPINION OF THE UNITED STATES
AIR FORCE COURT
OF MILITARY REVIEW

ACM 20886
MAY BE CITED AS
_____CMR_____

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

United States v Colonel GERALD V. KEHRLI, 540-22-2884 FR, Headquarters 22d Air Force	SEVENTH AIR FORCE (PACAF) Sentence adjudged 16 February 1971 by GCM convened at Tan Son Nhut Air Base, Republic of Vietnam. Military Judge: Thomas J. Connolly. Approved sentence: Fine of fifteen thousand dollars ($15,000.00), confinement at hard labor for three (3) years (deferred), and further confinement at hard labor until fine is paid, but for not more than one (1) year in addition to the three (3) years adjusged.

17 August 1971

Appellate Counsel for the Accused:
Lieutenant Colonel Norman L. Paul.
Lieutenant Colonel Donald F. Paar filed a brief on behalf of the accused.

Appellate Counsel for the United States:
Colonel James M. Bumgarner and
Captain Bruce D. Viles.

Before

AMERY, GRAY, O'CONNELL, HALICKI and FRIEDMAN
Appellate Military Judges

D E C I S I O N

O'CONNELL, Judge:

In this case the accused was convicted of the following offenses involving marihuana, all violations of Article 134, Uniform Code of Military Justice: wrongful use of marihuana on 1 September 1970, 27 September 1970, and 15 November 1970(Specifications 1, 4 and 5 of the Charge); wrongful possession of marihuana on 20 November 1970 (Specification 6 of the Charge); wrongful solicitation of another individual to transfer marihuana on 1 October 1970 (Specification 3 of the Charge); and wrongful transfer of marihuana on 1 September 1970 and 27 September 1970 (Specifications 1 and 2 of the Additional Charge). He was found not guilty of Specification 2 of the Charge, which alleged that he solicited another individual to transfer marihuana on 15 September 1970. The court members sentenced him to confinement at hard labor for three years and to pay a fine of $15,000, with provision for one year additional confinement at hard labor until such fine is paid. The Commander, Twenty-Second Air Force, who took

action on the case because the Commander, Seventh Air Force was disqualified, approved the sentence. His action also provided that the deferment of confinement, previously ordered by the Commander, Seventh Air Force after sentence had been adjudged, will be continued until the sentence is ordered executed.

We have been presented with nine assertions of error--five by the individual trial defense counsel and four by the appellate defense counsel. In a very fine review, the Staff Judge Advocate has fully discussed the subject matter involved in six of these assertions of error and correctly resolved them adversely to the accused. We adopt his rationale and conclusions of these issues and deem further discussion to be unnecessary.

The individual trial defense counsel's fourth assertion of error is as follows:

> "THE COURT IMPROPERLY ADJUDGED A FINE AS A PART OF THE SENTENCE. THAT PORTION OF THE SENTENCE PROVIDING FOR CONFINEMENT IN LIEU OF PAYMENT OF THE FINE IS ILLEGAL. MCM, 1969 (Rev.), para 126h(3); United States v Landry, 14 USCMA 553, 34 MCR 333 (1964); Williams v Illinois, 399 US 235 (1970); Tate v Short, 39 US Law Week 4301 (1971)."

Also challenging the portion of the sentence providing for the fine, appellate defense counsel has set forth the following as his fourth assertion of error:

"THAT PORTION OF THE SENTENCE PURPORTING TO IMPOSE A FINE OF $15,000, IS ILLEGAL SINCE THE MILITARY JUDGE DID NOT INCLUDE A FINE AS A POSSIBLE PUNISHMENT IN HIS INSTRUCTIONS ON SENTENCE."

It is the position of the individual defense counsel that imposition of fines must be reversed for those situations where the accused has been unjustly enriched through his misdeeds (a situation not present here), and, further, that the provision for additional confinement upon nonpayment of the fine amounts to unfair discrimination between wealthy and nonwealthy accused. Appellate defense counsel claims prejudice from what he characterizes as a sentence adjudged which exceeded the legal framework set forth in the military judge's instructions given to the court members on the subject of the maximum permissible punishment. See United States v. Crawford, 12 USCMA 203, 30 CMR 203 (1961).

At trial by court-martial, a fine is an authorized form of punishment, as is the imposition of additional confinement as a means of securing the payment of the fine when payment thereof is not forthcoming. Manual for Courts-Martial, 1969(Revised edition), paragraph 126h(3); United States v Landry, 14 USCMA 553, 34 CMR 333 (1964); United States v. Cuen, 9 USCMA 332, 26 CMR 112 (1958); United States v McElroy, 3 USCMA 606, 14 CMR 24 (1954); United States v DeAngelis, 3 USCMA 398, 12 CMR 54 (1953). While the Manual, supra, provides that a fine is not normally adjudged unless the accused has been unjustly enriched as a result of his offense, this provision is directory rather than mandatory. United

States v Cuen, supra. Vital to a determination of the existence of prejudice is the sufficiency of the military judge's instructions to provide adequate guideposts to the court members in their deliberations on sentence; of like importance is the court members' awareness of their authority to penalize the accused and the limitations on their authority. United States v Caid, 13 USCMA 348, 32 MCR 348 (1962); United States v Johnson, 17 USCMA 288, 38 CMR 86 (1967).

In the present case, the military judge included in his explicit and comprehensive presentencing instructions a statement as to the permissible maximum punishment and a delineation of the types of punishment which could not be imposed upon an officer. A fine was not included in this list of prohibited punishments. He also furnished the court members a sentence work sheet which they obviously used in closed session; included in the sample forms for announcing the sentence was the berbiage for adjudging a fine. He included this work sheet in his instructions by reference, and counsel at trial indicated no objection to the instructions as a whole or the work sheet specifically and requested no additional instructions for the court members. In addition, when the court was reopened after sentence deliberations, the following informative colloquy between the military judge and the president took place:

"MJ: Has the court arrived at a sentence?

"JOHN: Your Honr, we first, before responding to the question, would like to ask a

question for clarification. The trial counsel at one time remarked that the person could be confined without dismissal or loss of retirement, is this correct? The instructions were not clear on this point. What was entailed in confinement?

"MJ: A court can impose any sentence that it believes appropriate within those maximum limits. Now, the court can impose one or several forms of different punishment so long as you stay within the limits as I outlined. In other words, one form of punishment does not necessarily follow another form of punishment. It is not a requirement to impose two separate kinds of punishment. To be more specific, a separation, punitive separation does not necessarily have to be imposed at the same time as another form such as confinement is imposed.

"JOHN: It is a related question. In a condition of confinement, do pay and allowances continue?

"MJ: They would unless sentenced by the court, the court imposed forfeitures.

"JOHN: We have reached a finding on sentence."

We conclude that the record of trial in this case makes it abundantly clear that these adequately instructed court members were fully aware of the extent of their authority and of the significance and results of the sentence they imposed. United States v Caid, supra; cf United States v Muir, 20 USCMA 188, 43 CMR 28 (1970); United States v Reid, 10 USCMA 71, 27 CMR 145 (1958).

We note that individual trial defense counsel had cited two relatively recent decisions of the United States Supreme Court as authority for his argument that the fine illegally discriminates against nonwealthy accused. These decisions are nondispositive of our case. Williams, supra, dealt with a situation wherein, upon nonpayment of a fine, additional imprisonment was imposed upon the defendant in excess of the statutory maximum for the substantive offense involved. Tate, supra, involved a defendant who was convicted in Corporation Court of Houston, Texas, for nine traffic offenses. Despite the fact that Texas had legislated a "fines only" policy for traffic offenses, he was imprisoned upon nonpayment of his fine--an action which the Court found exceeded the statutory limit of fines for the affluent and amounted to imprisonment of the defendant "solely because of his indigency".

In both Williams and Tate, supra, the Supreme Court emphasized that nothing said therein was intended to cast doubt on the constitutionality of imprisonment for nonpayment of a fine or to indicate that appropriate authorities are precluded from imprisoning an individual who willfully refuses to pay his fine. While both cases proscribe imprisonment of an individual solely because of indigency, neither casts doubt upon the validity of the sentence in this case. Conversely, this record makes it patent that Colonel Kehrli's "sentence was not imposed . . . because of his indigency but because he had committed a crime." See Williams v Illinois, supra, at page 242. Therefore, the accused suffered no prejudice from the form of sentence imposed.

Individual trial defense counsel's final assertion of error is as follows:

> "THE STAFF JUDGE ADVOCATE, IN HIS POST-TRIAL REVIEW, DISTORTED THE EVIDENCE IN THE CASE IN CHARACTERIZING THE NATURE OF THE ASSOCIATION OF THE ACCUSED WITH HIS ACCOMPLICES, THEREBY EFFECTIVELY DEPRIVING HIM OF FAIR AND COMPASSIONATE CONSIDERATION FOR POSSIBLE CLEMENCY BY THE REVIEWING AUTHORITY."

As substantiation for his contention, individual counsel points to the following verbiage in the review of the Staff Judge Advocate:

"While I recognize the accused's otherwise exemplary service record, I cannot ignore the ignominy of his behavior in the circumstances which resulted in his trial and conviction in this case. While the accused's use and possession of marihuana constitute serious offenses, the real gravamen of the accused's misconduct, in my opinion, is his transfer of marihuana to young airmen assigned to his squadron and the fact that he openly used marihuana in their presence.

"As the commander of an Air Force unit operating in a combat zone, this accused was responsible not only for the operational aspects of the mission - - which he apparently ably performed - - but also for the welfare and discipline of his men. In this latter responsibility, because of the distances from home, the hazards of the combat zone and the multitude of temptations, the accused, as commander, occupied a position not unlike a

parents' surrogate or a paterfamilias to the young men assigned under him. The accused, apparently not satisfied to smoke marihuana by himself, induced other younger men to smoke it with him. Rather than encouraging his men to respect and obey the law, the accused, by his conduct in the presence of young enlisted men, condoned and encouraged disobediance of the law."

The above language is contained in the final portion of the review under the title of "RECOMMENDATIONS". Earlier in the review, the reviewer had set out fairly, accurately, and in great detail the evidence adduced at trial, to include that indicating extensive experience with marihuana by the airmen referred to. As a result, the reviewing authority was fully apprised of the scope of the accused's activities and the nature of his association with his "accomplices". The comments amounted to the reviewer's overall interpretation of the accused's actions and character, including both the admirable and reprehensible aspects, they served the very real purposes of explaining and justifying his ultimate recommendations as to appropriate action on the case. In short, in the colorful vernacular of today's young people, the reviewer "told it like it is". His comments were founded on competent evidence and were well within the reasonable bounds of his discretion. See United States v Guinn, 12 USCMA 632, 31 CMR 218 (1962); United States v Laro, 41 CMR 995 (AFCMR 1970), pet denied, 41 CMR 403. This assignment of error is without merit.

The findings of guilty and the sentence are

AFFIRMED.

AMERY, Chief Judge, and HALICKI, Judge, concur.

GRAY, Senior Judge, and FRIEDMAN, Judge, absent.

UNITED STATES AIR FORCE

[SEAL]

COURT OF MILITARY REVIEW

JAMES A. JOHNSON, Major, USAF
Commissioner

You are notified of your right to petition the United States Court of Military Appeals for a grant of review with respect to any matter of law invcolved in this case within thirty days from the time you are notified of this Decision of the Court of Military Reviw. (Per 100c., MCM 1969)(Rev.))

EXCERPTS FROM STAFF JUDGE
ADVOCATE'S REVIEW

STAFF JUDGE ADVOCATE'S REVIEW
OF TRIAL BY COURT-MARTIAL

X General

1. Date of Review
11 May 1971

2. Date of Trial 12-13-14
15-16 Feb 71

3. TO:
Commander
Headquarters, 22d Air Force (MAC)
Travis AFB, California 94535

4. Place of Trial
Tan Son Nhut Air Base
Republic of Vietnam

* * *

SJA Review, United States v Colonal Gerald V. Kehrli

1. PRELIMINARY

a. Jurisdiction.

The accused was convicted in this case of three specifications alleging wrongful use of marihuana (Specifications 1, 4 and

5 of the Charge), one specification alleging wrongful possession of marihuana (Specification 6 of the Charge), one specification alleging the wrongful solicitation of another to transfer marihuana (Specification 3 of the Charge) and two specifications alleging wrongful transfer of marihuana (Specifications 1 and 2 of the Additional Charge), all in violation of Article 134, UCMJ. He was acquitted of one specification alleging the wrongful solicitation of another to transfer marihuana (Specification 2 of the Charge). The charges and specifications were referred for trial to the General Court Martial appointed by Special Order AB-5, Headquarters, Seventh Air Force (PACAF), APO San Francisco 96307, dated 9 February 1971.

In compliance with requests from Headquarters, Seventh Air Force and Headquarters, Pacific Air Forces, and pursuant to paragraphs 84c and 85, MCM, 1969 (Rev.) and UCMJ, Articles 60 and 61, this headquarters has assumed the responsibility for the initial review and action upon the record of trial in this case due to the disqualification of the Commander, Seventh Air Force, the convening authority.

The accused was represented during the entire proceedings by Lieutenant Colonel Donald F. Paar, a certified Air Force Judge Advocate, requested by the accused as individual defense counsel, and by Captain Edwin F. Hornbook, a certified judge advocate who was the appointed defense counsel. The accused

did not request trial before the military judge alone.

The accused was, at the time of the offenses alleged and at the time of trial, a member of the United States Air Force. The record of trial contains no indication of any jurisdictional defect with respect to any of the offenses or the offender.

b. Arraignment.

The accused was properly arraigned on eight specifications alleging violations of Article 134, Uniform Code of Military Justice, as described above.

II. MOTIONS PRIOR TO PLEADING

Prior to entering his plea, the accused moved for appropriate relief, and objected to the admissibility of certain evidence pertaining to Specification 6 of the Charge, which alleged the accused's possession of marihuana.

a. Motions for Appropriate Relief.

The accused based his first motion for appropriate relief on the grounds that there were sessions of the Article 32, UCMJ, investigation conducted by the investigating officer at which neither counsel nor the accused were present. Specifically, the accused alleged that, prior to

the Article 32 sessions attended by counsel and the accused, the investigating officer interviewed the witnesses, and coached them with regard to their testimony. The accused charged that these improprieties denied the accused the rights to due process of law.

The Article 32 testimony of Sergeant William F. Miller (Art 32, Ex 13), Staff Sergeant James K. Spaulding (Art 32, Ex 14), First Lieutenant Peter C. Jackson, (Art 32, Ex 15), Ariman First Class Wendell W. Robards (Art 32, Ex 10), and Sergeant Johnnie A.Williams (Art 32, Ex 11), on cross-examination, indicated that, prior to testifying in the Article 32 proceedings, they discussed their testimony with Major Jeter, the Article 32 Investigating Officer, as the accused alleged pursuant to his motion. The accused did not, however, question these witnesses, on cross-examination at the Article 32 investigation, to determine whether, as he charged at trial, the Article 32 officer formalized their testimony. The testimony of each of them was to the effect that the witness had "gone over" or "discussed" his testimony with Major Jeter.

The purpose of the Article 32 investigation is to inquire into the truth of the charges and to secure information upon which to determine what disposition should be made of the case. It is not the investigating officer's function to perfect the case against the accused, but to conduct a thorough and impartial investigation. Paragraph 34, MCM, 1969 (Rev.). There is no evidence, either in the Article 32 investigation or in the record of trial, to indicate that the

investigating officer conducted the proceedings other than as prescribed by the Uniform Code of Military Justice and the Manual for Courts-Martial, 1969 (Revised Edition). Assuming, however, that the Article 32 investigating officer acted improperly by "going over" or "discussing" with witnesses their testimony prior to the formal hearing, there is no showing of prejudice to the accused, other than his own bare assertion thereof. The law is well settled that a defect, if one exists, in the preliminary proceedings will not justify setting aside a conviction unless it clearly appears that the error materially prejudiced the accused at trial. United States v. Mickel, 9 USCMA 324, 26 CMR 104 (1958); United States v. Cunningham, 12 USCMA 402, 30 CMR 402 (1961). The Military Judge, after reading the Article 32 proceedings, denied the motion (R. 12). Absent any showing of prejudice, his action in so doing was entirely proper.

The accused moved for appropriate relief on the grounds that the accused had been denied military due process. Specifically, the accused charged that the Commander, 377 Combat Support Group, the offcer exercising summary and special court-martial jurisdiction over the accused, was, in the accused's case, completely bypassed. Because no charges were forwarded to him as the officer exercising summary court-martial jurisdiction, and because there was no letter of transmittal accompanying the charges, the accused contends, there was no

opportunity to have the case considered at the lowest possible level. The accused charged that, from the beginning, this case was conceived as one to be tried by general court-martial and that the Commander, Seventh Air Force, having taken the case out of proper channels, deprived the accused of military due process.

The charges in this case appear to have been processed at the Headquarters, Seventh Air Force level only. Brigadier General Charles I. Bennett, Jr., Seventh Air Force Chief of Staff, was the accuser. He was sworn to the charges by Colonel Archie L. Henson, Seventh Air Force Staff Judge Advocate. Major Jeter, the Article 32 Investigating Officer, forwarded his report of investigation to the Commander, Seventh Air Force, who, upon the advice of his Staff Judge Advocate, referred the case for trial by General Court-Martial.

While charges are <u>ordinarily</u> forwarded by the officer exercising summary court-martial jurisdiction over the accused, after having been properly investigated, and when he is <u>not</u> empowered to convene the appropriate forum to try the case, to the officer exercising the appropriate court-martial jurisdiction, paragraph 33, MCM, 1969 (Rev.), such processing is not required, and failure to do so does not constitute a denial of military due process. Indeed, the officer exercising general court-martial jurisdiction has, in addition to his

authority to refer charges for trial by general court-martial, the authority to refer the charges for trial by inferior courts-martial or, in lieu of trial, to impose punishment under Article 15, UCMJ. In fact, he has the authority to take any action on the charges which the immediate commander, or the officer exercising summary court-martial jurisdiction is authorized to take. Paragraph 35, MCM, 1969 (Rev.). In my opinion, the procedure followed, albeit extraordinary in some respects, did not deprive the accused of any substantial right.

The accused alleged, as the second basis for his motion for appropriate relief, that the Commander, Seventh Air Force, was, in fact, the accuser in the case, and, thus, ineligible to refer the charges for trial by court-martial. The accused further contended that he was prejudiced by General Clay's policy which, he alleged, established a dual standard for drug offenders; one for lower grade airmen, who receive Article 15 punishment, and one for officers where the charges were tried by general court-martial. He complained further that when he attempted to interview General Clay regarding this policy, General Clay, while consenting to be interviewed, imposed the requirement that his Staff Judge Advocate, Colonel Henson, be present throughout. The accused asked that the Military Judge direct that General Clay be available for interview with counsel for

the accused and that Colonel Henson not be present. The Military Judge advised defense counsel to arrange for an interview with General Clay, but declined to preclude General Clay from having his Staff Judge Advocate present, if he desired.

Subsequently, the court was presented with the stipulated testimony of General Lucius D. Clay, Jr., Commander, Seventh Air Force (Appellate Exhibit 2) and Brigadier General Charles I. Bennett, Jr., Chief of Staff, Seventh Air Force (Appellate Exhibit 3). The parties to the trial agreed that General Clay would have testified that, as the general court-martial convening authority for Seventh Air Force, between 20 and 29 November 1970, he was briefed by Colonel Archie Henson, Seventh Air Force Staff Judge Advocate, on the alleged conduct giving rise to the charges in the accused's case. General Clay directed that charges be preferred and that the case be referred to trial by general court-martial. He directed that Colonel Henson do what was necessary to process the case (App Ex 2). The parties to the trial agreed that Brigadier General Charles I. Bennett, Jr., would have testified that on 29 November 1970 and on 23 December 1970, he preferred charges against the accused, having obtained personal knowledge of the results of the investigation into the accused's conduct, pursuant to Colonel Henson's recommendations and because of the accused's unique duty status. He did not know whether General Clay knew of or consented to

his preferring these charges. He was not ordered to prefer the charges; and, prior to signing the charge sheets, he discussed the matter with no one save Colonel Henson (App Ex 3). Captain Charles L. Wiest, Jr., Assistant Staff Judge Advocate, 377 Combat Support Group, Tan Son Nhut Air Base, Vietnam, was called as a witness for the accused. He had attended a Junior Officers' Council luncheon on 31 October 1970 at which General Lucius D. Clay, Jr., gave an address touching, generally, on drug abuse. General Clay stated that drug abuse detracted from the mission and could not be tolerated. He further stated that offenders of different ranks were treated differently; that more was expected from senior NCO's and officers, and if they deviated from what was expected of them, they could expect to be punished (R. 20). Captain Wiest further testified that he has handled marihuana cases at the Tan Son Nhut base legal office, all of which involved lower grade airmen. Only one case he was involved with was tried by special court-martial; and the rest were handled by Article 15 punishment, or by administrative discharge (R. 21).

The accused, Colonel Gerald V. Kehrli, testified that on 29 November 1970 and again on 24 December 1970, he was presented with charges by Brigadier General Charles I. Bennett, Jr. On each occasion General Bennett was very cordial, and halfway apologetic about presenting charges to the accused. General Bennett said, "I hate to do this, but my

office is the paper mill or go-between" or words to that effect (R. 22-24).

There is no evidence to indicate that General Clay is the accuser in this case, and thus disqualified from referring the charges for trial. The evidence indicates that having reviewed the investigation, he directed that charges be preferred. This action on his part is no more than the proper exercise of his authority as superior commander in the field of military justice. United States v. Wharton, 33 CMR 729 (AFBR 1962), pet. denied, 33 CMR 436 (1963). Nor does the fact that General Clay took the position prior to trial that he would not tolerate drug use among senior NCO's and officers disqualify him from acting as convening authority. Indeed, a contrary position by the senior Air Force commander in the combat zone would have been unthinkable. In my opinion, the Military Judge properly denied the motion for appropriate relief (R. 30).

b. Objections to the Admissibility of Certain Evidence.

The accused contended that, on 20 November 1970, he was improperly apprehended by Captain William F. Daddio, the then chief law enforcement officer, 377 Security Police Squadron, Tan Son Nhut Air Base, Vietnam, who, at the time he apprehended the accused, he contends, had absolutely no knowledge of any offense the accused may have committed

which would warrant apprehension. Subsequently, and pursuant to this apprehension, Captain Daddio discovered evidence of 2.85 grams of marihuana, which the accused contends cannot be properly admitted in evidence against him.

Captain William F. Daddio testified that on 20 November 1970, he was assigned to the 377 Security Police Squadron. On that evening, he apprehended the accused at the Vietnamese Officers' Club on Tan Son Nhut Air Base, Vietnam (R. 35). Following the accused's apprehension, Captain Daddio observed a green Salem pack on the door ledge of the accused's car. He picked up the package which contained four hand rolled cigarettes containing a greenish brown vegetable-like substance.

On the afternoon of 20 November 1970, Captain Daddio had been briefed by Special Agent Cain of the OSI regarding their belief that the accused was wrongfully using and possessing marihuana. He was advised that an informant, an Army Lieutenant attached to Military Intelligence, had seen the accused use and possess marihuana. Captain Daddio was advised that the informant would be with the accused that evening and would, if the accused had possession of marihuana, make this fact known to Captain Daddio and the OSI agents accompanying him by prearranged signal. Captain Daddio was informed that, when the OSI advised him that the informant

had given the signal, he would know that the accused had marihuana in his possession.

On the evening of 20 November, Captain Daddio was part of a group which included OSI agents, that had the accused under surveillance from approximately 1800 hours to 2230 hours. At no time during this surveillance did Captain Daddio observe the accused violate the law. At about 2230 hours Captain Daddio was standing on the entrance steps to the VNAF Officers' Club with Special Agent Cavicchio of the OSI. Special Agent Cain was in his vehicle at the bottom of the steps. At this time the accused and the informant exited the club. He was advised by the OSI that the informant had given the signal and he thereupon apprehended the accused (R. 34-42). Special Agent Stephen Cain, Office of Special Investigations, District 50, Tan Son Nhut Air Base testified that in the early afternoon of 20 November 1970, the OSI determined to conduct a surveillance of the accused's activities that evening. Special Agent Cain and other agents briefed Captain Daddio regarding the OSI investigation of the accused for use and possession of marihuana. Captain Daddio was advised that the accused was alleged to have used and possessed marihuana in the presence of a U. S. Army intelligence officer, a Lieutenant Jackson, who was acting as an informant, and that there was a meeting supposed to take place that evening between the accused and the Lieutenant Jackson. Special Agent Cain and another OSI agent, had, on the evening of 19 November 1970, discussed a signal with Lieutenant Jack-

son, that he was to use if the accused should come into possession of marihuana. It was agreed that the prearranged signal would be for Lieutenant Jackson to put his handkerchief to his nose and make a gesture of blowing into it. He told Captain Daddio what the signal would be. He advised him further that, if the signal was given, he would be requested to apprehend the accused.

On the evening of 20 November 1970, while waiting outside the VNAF Officers' Club, Special Agent Cain saw the accused and Lieutenant Jackson emerge from the club. As the accused entered his vehicle, Special Agent Cain saw Special Agent Cavicchio indicate that he had seen the signal. Cain asked Cavicchio indicate that he had seen the signal. Cain asked Cavicchio if he had seen the signal, to which the reply was affirmative. Cain then indicated to Daddio to make the arrest. Cain then proceeded to the accused's car where he introduced himself as an OSI agent and asked the accused to get out of his car. The accused complied, and Cain saw a crumpled Salem cigarette package laying on the door ledge of the driver's side of the car. He later saw Captain Daddio examining the contents of the package. At no time did Cain see the accused violate any law, nor did he personally see the informant give the prearranged signal. The signal was communicated to him through Cavicchio (R. 42-50).

Captain Daddio was recalled to testify

that the items marked Prosecution Exhibit 1 for identification were those he found in the accused's car on 20 November 1970.

The accused's objection to the admissibility of the evidence found on the door ledge of the accused's car (Prosecution Exhibit 1 for identification) on the basis that it was discovered as the result of an illegal apprehension was overruled by the Military Judge (R. 55). I concur. The accused's apprehension by Captain Daddio was based upon information furnished him during a briefing on the afternoon of 20 November 1970 and later through signals communicated to him through OSI agents to the effect that the accused was in the possession of marihuana. There is no requirement that the arresting officer base his apprehension on his own personal knowledge that the accused has committed an offense. He may, as here, rely on the totality of information known to the OSI special agenst and communicated to them from an informant they had been using for the period of more than a month. The law generally recognizes that, in the interests of effective law enforcement, there is a need for freedom on the part of police officers to function not only on the basis of information personally known to them, but also on the basis of the totality of information known to police organization as a whole. United States v. Herberg, 15 USCMA 247, 35 CMR 219 (1965). I am satisfied, as was the Military Judge, from the competent evidence of record, that the accused's apprehension on the evening of 20 November 1970, was lawful.

* * *

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IV. EVIDENCE

First Lieutenant Peter C. Jackson, a member of the United States Army, was stationed at Pleiku, Vietnam. He met the accused at Tan San Nhut BOQ I on 1 October 1970, when the accused invited Jackson to join him for dinner. After dinner he was invited to the accused's quarters for an after dinner drink, after which they proceeded to Cholon for a beer and returned to Jackson's quarters. The accused and Jackson arranged to meet the next night, 2 October 1970, at the Auriga Hotel, which rendezvous was kept. From the Auriga the accused and Jackson proceeded to the accused's quarters for a drink. During this period, the drug abuse problem in the military was discussed. The accused mentioned that on occasion he had used marihuana himself, that there was a heavy usage in his organization by officers and enlisted, and that he didn't consider it to be a problem. The accused stated he preferred that men use marihuana rather than alcohol because the marihuana smoker always made it to work the next day and the drinkers might not. The accused mentioned that he had converted a young Captain in his unit to the use of marihuana, and has smoked with him on one occasion. Later, on the evening of 2 October 1970, the accused and Lieutenant Jackson went on the roof-top bar of the Auriga, where the accused suggested they step outside for a smoke. Once outside, the accused took out a cigarette, loosely packed, with a twisted end.

The accused lit the cigarette, and handed it to Jackson, who pretended to take a drag from it. Lt Jackson was, at the time, positive the cigarette was marihuana. Fifteen minutes after returning to their booth inside, the accused suggested that he and Jackson go back outside for another smoke. Once outside the accused lit a cigarette and handed it to Jackson, who pretended to smoke from it. The accused stated that he thought marihuana was a good thing, because it had given him an opportunity to eliiminate a generation gap and better understand his men.

Upon his return to his unit the following day, Lieutenant Jackson submitted a report on the accused's activities. On 19 October 1970, Lieutenant Jackson again visited the accused. While driving to the Auriga Hotel, Lieutenant Jackson and the accused discussed marihuana. The accused asked Jackson whether marihuana was readily accessible in his area. Jackson replied that it wasn't available for officers. The accused replied that when he returned from his trip he would take care of Jackson, and not to worry about it.

Lieutenant Jackson returned to Saigon on 19 November 1970, having received a telephone invitation from the accused on the 15th. Immediately upon his arrival in Saigon, he contacted the OSI, with whom he had previously been in contact regarding the accused, and advised them he would be meeting with the accused. Lieutenant Jackson arranged with the accused to

meet him on the evening of 20 November, to go to the accused's quarters. Subsequently, Lieutenant Jackson met with OSI Special Agents Cain and Jansen. At this meeting, it was agreed that Jackson would meet the accused as planned; and that, if he felt the accused was in possession of marihuana, he would signal the agents by taking out a white handkerchief and blowing his nose.

On the evening of 20 November 1970, Jackson met the accused, as planned. They went to the accused's quarters and then to BOQ I for dinner where, during the course of conversation, the accused said "smoking won't hurt you but cigaretts will," or words to that effect. In his quarters, the accused referred to music he was playing on his tape as "music to get stoned by." The accused and Jackson returned to his quarters, after eating at BOQ I, where the accused mentioned that a man named Butch Miller would be over to give him some marihuana; but he said, "if Miller didn't show up they needn't worry because he had four in his room and two apiece would be more than enough to do it." Miller did not show up. The accused went to his bedroom area, and came out with a Salem cigarette package in his hand, crumpled with the top open. The accused said they would go to the VNAF Club, smoke two in the parking lot, go downtown and have a few drinks, and smoke two downtown. When the accused and Lieutenant Jackson arrived at the VNAF Club, the accused told Jackson he was too nervous,

that he should relax and learn to enjoy smoking marihuana.

Lieutenant Jackson had given the pre-arranged signal twice after he and the accused left the latter's quarters, and three times at the VNAF Club. When the accused and Jackson left the VNAF Club, just as they were approaching the accused's car, Jackson heard the words "halt" or "stop." The accused got into his vehicle and attempted to start it, telling Jackson to "hurry up, get in, let's go" (R. 127-138).

Lieutenant Jackson was given no grant of immunity. He knew the odor of marihuana, having had some experience of a professional nature with the substance. The accused did not specifically identify the cigarettes he got from his sleeping area as marihuana. Lieutenant Jackson saw Special Agent Cain, while in the accused's quarters. He told Cain he was expecting someone to show up, possibly with a large quantity of marihuana. Lt Jackson did not identify himself to the accused as an Army Intelligence Officer. Lieutenant Jackson gave the OSI a statement regarding the accused on 10 October 1970 (R. 138-150).

Special Agent Stephen Cain initially became involved in the accused's case on 19 November 1970, when he was assigned to talk to Lieutenant Jackson, 525 Military Intelligence Group, and to get a background on what had transpired on the OSI investigation of the case to that point. Mr. Cain determined that the OSI came into the case in early October 1970, and that Lt Jackson had been interviewed by Special Agents Staton and Jansen of his organization, and Special Agent Zucath of the Nha Trang OSI office. After going over the investigation with Special Agent Jansen, the immediate handling agent on the case, Cain and Jansen went to the Auriga to meet with Lieutenant Jackson. At that meeting, Mr. Cain questioned Lieutenant Jackson regarding what had transpired since the first of October. Subsequently, they arranged that, if Lieutenant Jackson was to be the accused's company the following day, 20 November 1970, he should contact Cain and Jackson that day.

The following day Lieutenant Jackson did contact Cain, who, with Special Agent Stroup, picked him up at MACV headquarters. At this meeting, Cain and Jackson determined that, if Jackson was reasonably sure the accused had marihuana in his possession, he should signal by blowing his nose into his handkerchief. Later that day Cain briefed Captain Daddio, a security policy officer and his superior, Colonel Murphy, Chief of Base Security Police, concerning the OSI investigation of the accused's possible use of marihuana. Cain briefed them that he had talked to Jackson and was reasonably convinced that he was qualified to know what marihuana looked and smelled like. Cain briefed Daddio on the information Jackson had supplied the

OSI regarding the accused's alleged use of marihuana. Daddio was also briefed on the prearranged signal with Jackson.

At about 1700 hours, 20 November 1970, Cain, Special Agents Stroup, Cavicchio and Carney and Captain Daddio arranged themselves in two vehicles and commenced surveillance of the accused. This continued until approximately 2230 hours that evening, when they saw the accused exit the VNAF Officers' Club. At that time Cain saw Cavicchio motion that he had seen Jackson pass the prearranged signal. After confirming Cavicchio's signal, Cain indicated to Captain Daddio to effect the accused's apprehension, and proceeded himself to the accused's vehicle where he found the accused seated. Cain introduced himself as an OSI agent and asked the accused to exit his vehicle. The accused, after some protest, exited the vehicle. Mr. Cain saw the cigarette package (Pros Ex 1) lying on the door ledge of the accused's vehicle. It consisted of the Salem cigarette package and four hand rolled cigarettes, commonly called "joints". Cain later saw Captain Daddio examining the contents of the package, having opened one of the four cigarettes. Cain asked Daddio to transport the package and cigarettes back to OSI headquarters where they were logged as evidence and secured. The following day, Cain turned the evidence over to Special Agent Stone from the Bien Hoa OSI office for transport to the criminal laboratory at Long Binh for analysis (R. 151-157).

Captain William F. Daddio testified that on 20 November 1970 he was briefed by Mr.Cain of the OSI, that an informant had furnished the OSI with information regarding the accused's use of marihuana, and that evening he would be asked to assist in the surveillance of the accused. He was advised that the informant would give a signal if the accused had marihuana in his possession, and that he would apprehend the accused if the signal was given. On the evening of 20 November 1970, at about 2230 hours, Daddio saw the accused depart the VNAF Officers' Club with the informant, going out to his vehicle in the parking lot. As the accused passed by Daddio, the informant blew his nose. Special Agent Cavicchio, accompanying Daddio, notified him that the signal was given, at which time Daddio proceeded to effect the apprehension. By the time Daddio got to him, the accused was in his vehicle. Daddio went to the passenger side of the car, opened the door, identified himself and told both occupants to get out of the car. As Daddio proceeded around the car to the driver's side, where the accused was sitting, he noticed the accused fumbling around the seat. He advised the accusedhe was under apprehension for alleged possession of marihuana. When the accused got out of his vehicle, Daddio noticed what seemed to be a cigarette package in his hand. The accused appeared to be hiding it behind his leg, and as he got out of the car it fell from his hand to the car door ledge. Daddio left the package there until he had

searched the accused, then picked it up and, opening the pack, broke one of the cigarettes open. Therein he found a greenish brown vegetable-like substance. There were four cigarettes with the ends rolled in, not twisted, about two-thirds the size of a commercial cigarette. Daddio released the package, the papers and the vegetable matter to Mr. Cain at OSI headquarters (R. 160-163). During the entire period of surveillance, Daddio did not see the accused commit any criminal offense. He had not received orders from the Base Commander to apprehend the accused.

* * * *

RECOMMENDATIONS OF THE STAFF
JUDGE ADVOCATE

1. I have read the record of trial and I concur in the foregoing review.

2. The foregoing review constitutes the reviewer's and my summary of the evidence, opinion as to the adequacy and weight of evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with regard to the findings and the sentence. As the officer exercising general court-martial jurisdiction in this case, you are empowered to weigh the evidence, judge the credibility of the witnesses and determine controverted questions of fact, recognizing that the trial

court saw and heard the witnesses. Before approving a finding of guilty you must determine that such finding is established to your satisfaction beyond a reasonable doubt by competent evidence properly admitted before findings. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and the sentence, or such part or amount of the sentence, including a sentence which is changed from, but is lesser than, that adjudged by the trial court, as you find correct in law and fact and as you in your discretion determine should be approved.

3. A form of action designated to accomplish the above recommendation is appended for your signature if you approve.

CHARLES G. REID, Colonel, USAF
Staff Judge Advocate